United States Court of Appeals

for the Second Circuit

APPENDIX

75-7447

United States Court of Appeals

FOR THE SECOND CIRCUIT

MADELINE ERIA, individually and as Administratrix of the goods, chattels and credits which were of VINCENT M. ERIA, deceased,

Plaintiff,

—against—

TEXAS EASTERN TRANSMISSION CORP., TEXAS EASTERN CRYOGENICS, INC., BROWN & ROOT, INC., NAPP GRECCO COMPANY, BATTELLE MEMORIAL INSTITUTE, THE DOW CHEMICAL COMPANY, G. T. SCHJELDAHL, INC. and E. I. DUPONT DENEMOURS & CO.,

Defendants.

TEXAS EASTERN TRANSMISSION CORPORATION and TEXAS EASTERN CRYOGENICS, INC.,

Defendants-Appellants,

—against—

THE DOW CHEMICAL COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

(Attorneys Names on Inside Cover)

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PAGINATION AS IN ORIGINAL COPY

INDEX

Docket Entries

DATE	PROCEEDINGS
2-26-75	Notice of deft. The Dow Chemical Co. filed.
2-26-75	Answer and Cross Complaint of deft the Dow Chemical Co. filed.
2-26-75	Interrogatories of deft the Dow Chemical Co. filed.
2-26-75	Third Party Complaint filed. Third Party Summons issued.
2-26-75	Answer to Interrogatories filed.
2-26-75	Answer and Cross Complaint of The Dow Chemical Co. filed.
2-26-75	Notice of deft The Dow Chemical Co. filed.
2-27-75	Answers of Brown & Root to interogatories by the Dow Chemical Co. filed.
2-27-75	Summons returned and filed/executed (75C-205).
2-28-75	Before COSTANTINO, J.—Case called—Motion granted (Deft's motion providing that the answer of Du Pont in each of said suits be deemed amended, etc.)—Order to be submitted.
2-28-75	Answers to interogatories propounded by deft Walsh Construction Company filed.
2-28-75	By COSTANTINO, J.—Order dated 2/28/75 filed that deft's motion be granted and that the answers of deft E.I. Du Pont de Nemours and Co. be amended, etc.
3- 4-75	Answers of Battelle Memorial 75C-205 & 205) filed.

Docket Entries

DATE	PROCEEDINGS
3- 5-75	ANSWER filed. (Dow Chemical Co. 75C 205)
3- 5-75	Notice of list of attys filed.
3- 5-75	By COSTANTINO, J.—Order to show cause dtd 3-4-75 ret 3-6-75 with proof of service for an order over-ruling the objections interposed by Dow Chemical to the interrogatories, etc. filed.
3- 5-75	BY COSTANTINO, J.—Order to show cause dtd 3-3-75 ret 3-6-75 for an order limiting the use of documents produced by Dow Chem., etc. filed without proof of service.
3- 5-75	BY COSTANTINO, J.—Order to show cause ret 3-6-75 for an order to enjoin defts from proceeding in Texas (Harris Cty Court), etc. filed with proof of service.
3- 5-75	Notice of Motion ret 3-6-75 for an order compelling deft to service & file answer to interrogatories filed.
3- 6-75	Copies of Order to Show Cause ret 3-6-75 with proofs of service attached filed.
3- 6-75	Brief on motion to compel deft Battelle Memorial to answer interrogatories filed.
3- 6-75	Memorandum in support of deft Texas Eastern's application for an order to show cause filed.
3- 6-75	Before COSTANTINO, J.—Case called. Motion to limit the use of deft argued & granted. Submit order.—Motion to enjoin defts argued.

Docket Entries

DATE	PROCEEDINGS
	Decision reserved.—Motion to over-rule the objections interpounded by deft Dow Chemical argued. Respectfully referred to Judge Catoggio.—Motion to compel deft to answer interrogatories argued. Referred to Judge Catoggio.
3- 6-75	Affidavit of Leonard L. Rivkin in opposition to deft Texas Eastern's order to show cause dtd 3-4-75 filed.
3- 6-75	Memorandum in opposition to Dow's proposed protective order filed.
3- 6-75	Affidavit and memorandum of law in opposition to order staying state court proceedings filed.
3- 6-75	By COSTANTINO, J.—Order dtd 3-6-75 re deposition of NYC and USA etc filed. (p/c mailed)
3- 6-75	By COSTANTINO, J.—Order dtd 3-6-75 re discovery and inspection of Dow Chemical's documents etc. See Order. (p/c mailed).
3- 7-75	Third-party summons returned and filed/executed (75C-197).
3- 7-75	Summons returned and filed/executed. (75C-195).
3- 7-75	Summonses returned and filed/not executed as to Mid-Valley Inc and Infra-Red Surveys filed.
3- 8-75	By COSTANTINO, J.—Order dated 3/8/75 filed that the time for the deft Porter Hayden Co. to answer is extended to 3/25/75

Docket Entries

DATE	PROCEEDINGS
3-10-75	Summons returned & filed./Executed (Battaglino—75C178—Originally filed in 75 C 178 on 2-25-75)
3-10-75	Stenographer's transcript dtd 3-6-75 filed.
3-11-75	By COSTANTINO, J.—Order dtd 3-11-75 extending time of Porter-Hayden Co to answer complaints filed.
3-12-75	Affidavit in opposition to motion for stay of Texas Discovery proceedings filed.
3-12-75	Memorandum of Law in opposition to motion of Dow Chem Co filed.
3-12-75	Stenographer's transcript dtd 3-10-75 filed.
3-12-75	By COSTANTINO, J.—Stipulation dtd 3-12-75 extending time for Battelle Memorial to answer interrogatories served by the Dow Chemical Co to 4-22-75 filed.
3-12-75	Befor COSTANTINO, J.—Case called and motion to restrain Texas Eastern etc argued and withdrawn.
3-12-75	By COSTANTINO, J.—Stipulation dtd 3-12-75 extending time for American Society for Testing & Materials to answer complaint of Clementina Mafaro to 3-31-75 filed.
3-12-75	By COSTANTINO, J.—Stipulation dtd 3-12-75 extending time for American Society for Testing & Materials to answer complaint of Elizabeth Battaglino to 3-31-75 filed.

Docket Entries

DATE	PROCEEDINGS
3-12-75	By COSTANTINO, J.—Stipulation dtd 3-12-75 extending time for American Society for Testing & Materials to answer complaint of Anna Gastiaburo to 3-31-75 filed.
3-12-75	By COSTANTINO, J.—Stipulation dted 3-12-75 extending time for Porter Hayden Co. to answer to 3-25-75 filed.
3-13-75	Answer of Brown & Root to amended complaint filed.
3-14-75	By COSTANTINO, J.—Order dtd 3-14-75 that if at end of depositions of Dow Chemical trial will go forward in June discovery in Texas action will await end of trial, etc. filed.
3-14-75	By COSTANTINO, J.—Order dtd 3-14-75 extending time of Ames Paint & Chemical Co to answer complaint (75C-190) to 4-30-75 filed.
3-14-75	Summons returned and filed/executed.
3-17-75	Answer of deft Brown & Root filed (C. Blackwell)
3-17-75	Notice of Entry filed
3-17-75	Answer of deft Mid Valley Inc. filed. (M. Eria)
3-17-75	By COSTANTINO, J.—Order dtd 3-17-75 extending time of Porter-Hayden to answer complaint (75C-170) to 3-25-75 filed.
3-18-75	Du Pont's Answers to Interrogatories of Texas Eastern Transmission Corp. and Texas Eastern Cryogenics, Inc. filed (M. Eria)

Docket Entries

DATE	PROCEEDINGS
3-18-75	Answer of E.I. Du Pont De Nemours and Co. filed (C. Blackwell)
3-19-75	Answers of Honeywell, Inc. and cross-complaint filed.
3-19-75	By COSTANTINO, J.—Orders dtd 3-13-75 exing time of Porter-Hayden to answer complaint to 3-4-75 filed.
3-19-75	By COSTANTINO, J.—Order dtd 3-18-75 extending time to answer (for DuPont) to 4-9-75 filed.
3-19-75	By COSTANTINO, J.—Orders dtd 3-19-75 extending time of Honeywell, Inc. & others to answer complaints to 5-19-75 filed.
3-19-75	Memorandum of law in support of order staying parties from proceeding in state court filed.
3-20-75	ANSWER of Sheldahl, Inc. filed (Blackwell, 75C197)
3-20-75	ANSWER & cross complaint of Honeywell filed. (Graves 75C199)
3-20-75	Stenographer's transcript dtd 3-12-75 filed.
3-21-75	Answers of The Society of the Plastics Industry filed.
3-21-75	Answer of deft Mid-Valley Inc filed (N. Fava)
3-21-75	BY COSTANTINO, J.—MEMORANDUM DECISION dtd 3-21-75 filed. Dow Chemical Co's

Docket Entries

DATE	PROCEEDINGS
	motion to enjoin TETCO & Cryogenics from proceeding in a lawsuit instituted in Harris County District Court, Texas will be held in abeyance until after the trial of the federal action, etc filed (pc mailed)
3-25-75	Answer of Dow Chemical to cross-claim (75C-197) filed.
3-24-75	By COSTANTINO, J.—Order dtd 3-21-75 extending time of Honeywell to answer complaint filed. (extended to 3-19-75).
3-25-75	Notice to take deposition of Dow Chemical filed.
3-25-75	Summons read and filed. Executed and not executed as indicated on the summons return (C. Blackwell)
3-25-75	Summons retd and filed. Executed and unexecuted as indicated on the summons return.
3-25-75	Notice of Taking of Deposition filed.
3-25-75	Answers and cross-claims of Battelle Memorial Institute filed.
3-25-75	Notice to take deposition of Texas Eastern filed.
3-25-75	Supplemental memorandum of law in opposition to motion of Dow Chemical for an injunction barring state court proceeding filed.
3-26-75	Dow Chemical's answers to pltff's interrogatories filed.

Docket Entries

DATE	PROCEEDINGS
3-28-75	Answer to cross-claim of deft The Society of the Plastics filed.
3-31-75	Answers of Porter-Hayden with jury demand filed.
3-31-75	Answers of Dow Chemical to interrogatories of DuPont filed.
4- 1-75	Answers of Porter-Hayden with jury trial filed.
4 -1-75	Answer of Wells Fargo with cross-claim filed.
4- 1-75	DuPont's answers to pltff's interrogatories filed.
4- 1-75	By COSTANTINO, J.—Stipulation dtd 4-1-75 extending time for Porter Hayden Co to answer to 4-1-75 filed. (75C 170; 75C 177; 75C 184; 75C 185; 75C 195; 75C 199; 75C 201)
4- 1-75	By COSTANTINO, J.—Order to Show Cause ret 4-9-75 at 10 am re why an order should not be entered extending until further order of this Court the time of defts to move or answer with respect to the complaints filed herein etc filed.
4- 1-75	Supplemental summons (75C-189) issued.
4 -2-75	Answers of Wander Iron Works with cross-claims filed.
4-25-75	Answer of Wander Iron Works to cross-claim filed.
4-14-75	Certified copy of judgment from C of A dismissing the appeal filed.

Docket Entries

DATE	PROCEEDINGS
4-14-75	ANSWER and Cross Complaint filed. (ARC Welding Service) (75C170)
4-14-75	ANSWER and Cross Complaint filed. (75C 199) (ARC Welding)
4-14-75	Demand for interrogatories filed. (75C 190)
4-14-75	Demand for interrogatories filed. (75C 198)
4-14-75	By COSTANTINO, J.—Order dtd 4-14-75 extending time of Honeywell to answer complaint (75C-189) to 3-18-75 filed.
4-14-75	By Costantino, J.—Order dtd 4-14-75 extending time of DuPont to answer complaint (75C-178) to 5-9-75 filed.
4-14-75	Notice of entry of order dtd 4-8-75 filed.
4-15-75	Answer of Walsh Construction Co., Inc. to Cross Complaint of the Society of the Plastic Industry filed. (M. Pestonit)
4-14-75	Answer of Walsh Construction Co., Inc. to Cross Complaint of Battelle Memorial Institute filed.
4-15-75	ANSWER filed. (75C 185 Arc Welding Ser.)
4-15-75	Demand for interrogatories filed. (75C 189)
4-15-75	Demand for interrogatories filed. (75C 184; 75C 195; 75C 185; 75C 199; 75C 177; 75C 170; 75C 201; 75C 181; 75C 182)
4-16-75	ANSWER and Cross complaint filed. (75C 189 Arc Welding)

Docket Entries

DATE	PROCEEDINGS
4-16-75	ANSWER and Cross complaint filed. (75C 190 Arc Welding)
4-16-75	Answer to cross claim. (75C 197 Dow Chemical)
4-16-75	ANSWER and Cross complaint filed. (75C 201 Honeywell)
4-16-75	Answer to cross claim filed. (75C 197 Dow Chemical)
4-16-75	ANSWER filed. (75C 191 Honeywell)
4-16-75	Answer to cross claim filed. (75C 197 Dow Chemical)
4-16-75	Answer and cross complaint of Sinapp Co filed (75C-197).
4-18-75	Answer of Honeywell to cross-complaint of Mid-Valley filed.
4-18-75	Supplemental summons returned & filed. Executed (Mid-Valley, Inc. 75 C 189—Powers)
4-18-75	Summons returned & filed/Not executed as to Mid Valley, Eddy Contracting, & Ames Paint (Pestonit—75C190)
4-18-75	Answers to interrogatories of Napp Grecco Filed (Eria 73C668)
4-18-75	Summons returned & filed./Not executed as to Mid Valley, Alien Atmosphere, Inc.) (Di Giovanni 75C177)
6-25-75	Memorandum Decisions by James B.M. McNally, Special Master filed.

Docket Entries

DATE	PROCEEDINGS
6-30-75	Notice to take deposition of Ernest L. Smith, et al filed.
7- 1-75	Cross-claim of Battelle Memorial Institute filed.
7- 1-75	Battelle Memorial's interrogatories & notice to produce filed.
7- 1-75	By COSTANTINO, J.—Order dated 6/30/75 filed that the time for the deft Ames Paint and Chemical Co. to answer the cross complaint is extended to Aug. 12, 1975
7- 3-75	Stenographer Transcript of 6/9/75 filed.
7 -9-75	Notice to take deposition of Michael G. Zebatekis, et ano filed.
7-14-75	Answer of Wells Fargo to cross-complaint filed. (75C-190)
7-14-75	Answers of Mulvihill Electrical to cross-claims filed.
7-16-75	ANSWER and Cross claim filed. (75C 198)
7-17-75	By COSTANTINO, J.—Order dated 7/17/75 filed extending time for the deft to answer the complaint to June 25, 1975
7-18-75	Answer to cross complaint. (Defts Wells Fargo and Wells Fargo Alarm Services) Jury demanded. 75C 198
7-18-75	Answer to cross claim filed. (Defts Wells Fargo and Wells Fargo Alarm Services) Jury demanded. 75C 198.

Docket Entries

DATE	PROCEEDINGS
7-24-75	Interrogatories of Battelle Memorial Institute filed.
7-25-75	Notice of motion to suspend injunction of 7-23-75, ret 7-31-75 at 10 A.M. filed.
7-28-75	Copy of letter from Charles P. Sifton dtd 7-25-75 filed.
7-28-75	Answer of Mulvihill Electric to cross-claim of deft Ames filed.
7-28-75	Answers of Wells Fargo to cross-claims filed.
7-30-75	Answer of Alien Atmospheres, Inc. filed.
7-30-75	Answer of Alien Atmospheres to cross-complaint of Mulvihill filed.
7-30-75	Answer of Alien Atmospheres to cross-claim of Battelle Memorial filed.
7-30-75	Battelle Memorial's answers to interrogatories filed.
8- 1-75	BY COSTANTINO, J.—MEMORANDUM AND ORDER filed. This court holds that TETCO must abide by its stipulation of 3-12-75 and refrain from noticing discovery procedures in the state action in Texas until the completion of the depositions of the DOW witnessess in N.Y. in the federal action, etc.
8- 2-75	ANSWER filed. (75C 185) (Porter Hayden)
8- 4-75	Notice of appeal and bond for appeal (by Texas Eastern) filed. Duplicate of appeal & duplicate of docket entries mailed to C of A. jn

Docket Entries

DATE	PROCEEDINGS
8- 5-75	Answer to Cross claim filed. (75C 201)
8- 5-75	Answers to interogatories and notice to produce filed.
8-11-75	Answers to interrogatories filed.
8-13-75	Answer to cross-claim of deft Mulvihill Electric Co. Inc. etc filed. (75C 190)
8-13-75	Answer of Cross claim of Infrared Surveys, Inc. filed. (75 C 190)
8-14-75	Amended cross complaints filed.
8-19-75	Amended cross complaints filed.
8-19-75	ORDER dtd 8-19-75 (signed by HON. JAMES M.B. McNALLY) permitting Walsh Construction Co. Inc. to serve and file fourth party summons and complaint filed.
8-19-75	Fourth party complaint filed. Summons issued.
8-20-75	ANSWER OF DEFT AMES PAINT & CHEMICAL to cross claim of Infrared Surveys, Inc. filed. (PESTONIT)
8-21-75	Answers of Ames Paint to cross claim of the Society of the Plastics filed.
8-21-75	Answers of Alien Atmospheres to cross-complaint of Ames & Wells Fargo filed.
8-22-75	Notice of motion for an order compelling deft Battelle to serve and file interrogatories. Motion will be brought on to be heard before Special Master James B. M. McNally on 8-29-75 filed.

Docket Entries

DATE	PROCEEDINGS
8-22-75	Answers and objections to interrogatories filed.
8-25-75	Civil scheduling order filed.
8-25-75	Request for production of documents and things filed.
8-25-75	Answers of Ames Paint to cross-complaints filed.
8-25-75	Answers to cross claims filed. (Mulvihill Electric Co.) 75C 198 75C 201
8-28-75	Maria Amato's answers to interrogatories & notice to produce of deft Battelle filed (MARIA AMATO)
8-29-75	Stenographer's transcript dtd 7-23-75 filed.
9- 4-75	Before COSTANTINO, J.—Case called. Pretrial adj'd to 9-16-75.
9- 8-75	Answer of deft to Cross Claim filed.
9- 8-75	Unsigned order to show cause filed.
9- 8-75	Letter dtd 7-16-75 to J. Costantino from Rivkin Leff & Sherman filed.
9- 8-75	Letter dtd 7-21-75 to J. Costantino from Charles P. Sifton filed.
9- 8-75	Stip. as to record pursuant to Rule 11 of Appellate procedure filed.
9-10-75	Copy of letter dtd 3-31-75 to J. Costantino from T.R. Briggs filed.

Order to Show Cause Dated March 4, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MADELINE ERIA, individually and as Administratrix of the goods, chattels and credits which were of VINCENT M. ERIA, deceased,

Plaintiff,

—against—

TEXAS EASTERN TRANSMISSION CORP., TEXAS EASTERN CRYOGENICS INC., BROWN & ROOT INC., NAPP GRECCO COMPANY, BATTELLE MEMORIAL INSTITUTE, THE DOW CHEMICAL COMPANY, G. T. SCHJELDAHL INC. and E. I. DUPONT DENEMOURS & CO.,

Defendants.

UPON READING AND FILING the affidavit of LEONARD L. RIVKIN, Esq., duly sworn to the 3rd day of March, 1975 and upon the exhibit annexed hereto and upon all the pleadings and proceedings heretofore had herein.

LET all parties to the above captioned Order to Show Cause appear before this Court, before Honorable Mark A. Costantino, at the United States District Courthouse for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York on the 6th day of March, 1975 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard and show cause

Order to Show Cause Dated March 4, 1975

Why an order should not be made herein, pursuant to 28 U.S.C. Section 2283 enjoining the defendants, Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. from proceeding in the Harris County District Court, Texas, i.e., a State Court, against the defendant, The Dow Chemical Company; and

Sufficient cause appearing therefor, let service of a copy of this Order with its supporting papers be served personally upon Mendes & Mount, Esqs., 27 William Street, New York, New York and LeBoeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York on or before the 5th day of March, 1975 and be deemed sufficient.

Dated: March 4, 1975

/s/ Mark A. Costantino
Judge of United States District Court

Affidavit of Leonard L. Rivkin in Support of Motion for Stay of Texas Property Damage Proceeding

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NASSAU, *ss.*:

LEONARD L. RIVKIN, being duly sworn, deposes and says:

That your deponent is a partner in the firm of Rivkin, Leff & Sherman, Esqs., attorneys representing the defendant, The Dow Chemical Company, and is fully familiar with all the facts and proceedings heretofore had herein.

That the instant Order to Show Cause requests a preliminary and final injunction prohibiting the defendants, Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. from proceeding against The Dow Chemical Company in a State Court in the State of Texas wherein the causes of action therein set forth are based on the identical incident of 2/10/73 which is the subject matter of the instant suit.

That the Court is respectfully requested to take judicial notice of the two years of litigation involving the incident occurring in Staten Island, New York on 2/10/73 involving the liquified natural gas tank explosion.

On or about February 10, 1975, the defendant, The Dow Chemical Company was served with a summons and com-

plaint in a State Court action in the State of Texas by the plaintiffs, Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. A copy of the summons and complaint in said action is attached hereto and made a part hereof. A mere perusal of said complaint will evidence to this Court the fact that the causes of action alleged by Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. against The Dow Chemical Company emanate from the explosion in the liquified natural gas tank in Staten Island on 2/10/73. Said complaint alleges damages by way of property damage, loss of profits, etc. The causes of action therein are in negligence and breach of warranty—the very same causes of action before this Court in the above entitled action.

It is respectfully submitted that the defendants herein, i.e., Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. are, among other things, harassing the defendant, The Dow Chemical Company by commencing the State Court action in Texas and should be enjoined from doing so pursuant to 28 U.S.C. Section 2283.

Some of the innumerable reasons this Court should exercise its discretionary equitable powers in enjoining Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. in the State Court action in the State of Texas, are:

1. Texas Eastern Transmission Corp and Texas Eastern Cryogenics Inc. have in fact cross claimed against the defendant, The Dow Chemical Company in the instant suit for negligence and breach of warranty.

2. The incident upon which the Texas action is predicated is in fact the very same incident which has been before this Court for two years.

Affidavit of Leonard L. Rivkin in Support of Motion for Stay of Texas Property Damage Proceeding

3. The State Court action in Texas was commenced almost two years subsequent to the inception of the instant Federal Court action.

4. That the instant action has been ordered to commence trial within approximately three months and voluminous discovery proceedings are presently being conducted.

5. That the Texas Court action not only emanates out of the same incident as is involved in the instant action, but does in fact involve the very same parties.

6. That the defendant, The Dow Chemical Company, will not be able to bring before the jurisdiction of the State Court in Texas all of the parties who are alleged to be involved in the liability situation emanating from the incident of 2/10/73.

7. That the final jury verdict in the instant case might not necessarily be res adjudicata to the newly instituted Texas action and thus this injunction is required to protect and permit the effectuation of this Court's judgment and further to aid in this Court's jurisdiction.

8. That all, if not most, of the witnesses not associated with Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. are located in and/or subject to the jurisdiction of this Court—not so the Texas State Court action.

9. That upon information and belief, the parties to the State Court action in Texas are Delaware corporations.

Affidavit of Leonard L. Rivkin in Support of Motion for Stay of Texas Property Damage Proceeding

10. That the issues before this Court would settle all the liability issues involved in the 2/10/73 incident in the LNG tank in Staten Island.

11. That it is submitted the Texas action was commenced merely to harass and vex the defendant, The Dow Chemical Company since each and every cause of action contained therein could have and can be brought within the confines of the instant case any time during the approximate two year pendency of this matter.

12. That it is respectfully submitted that justice cannot possibly be done in determining the issues of liability herein without the joinder of all of the parties in the instant action and all the witnesses subject to the jurisdiction of this Court.

That for any one or all of the foregoing reasons, this Court is respectfully requested to enjoin the defendants, Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. from proceeding against The Dow Chemical Company in the State Court action in Texas.

What is of equal importance, if not of more importance than the reasons set forth above, is the fact that there can be no damage to the defendants, Texas Eastern Transmission Corp. or Texas Eastern Cryogenics Inc. if this final injunction is granted since all of the issues raised in the Texas State Court action can be fully and fairly litigated in the instant action.

That due to the fact that the answers and/or appropriate relief papers in the State Court actions are required to be served in the very near future, your deponent has re-

quested a preliminary and temporary injunction against Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. from proceeding in the State Court action, thus permitting the avoidance of a default by the defendant, The Dow Chemical Company. For the very same reason, your deponent has instituted this request for relief by way of Order to Show Cause.

It is respectfully submitted that service of a copy of the instant papers upon Mendes & Mount, Esqs., with offices at 27 William Street, New York, New York, attorneys for Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. in the instant case as well as upon LeBoeuf, Lamb, Leiby & MacRae, Esqs., with offices at 140 Broadway, New York, New York, one of the attorneys of record in the State Court action aforementioned, be deemed sufficient for service upon Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc.

WHEREFORE, it is respectfully requested that this Court grant an interim injunction against Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. and thereafter a final injunction against said parties prohibiting them from proceeding against The Dow Chemical Company in the action mentioned herein presently pending in the State Court of Texas.

/s/ LEONARD L. RIVKIN

[Jurat omitted in printing.]

Affidavit of Ben G. Sewell in Opposition to Motion for Stay of Texas Property Damage Proceeding

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

BEN G. SEWELL, being duly sworn, deposes and says:

1. I am a partner in the firm of Sewell, Jamell & Riggs, 701 Capital National Bank Building, Houston, Texas, and I am the attorney of record for Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. (herein collectively referred to as "Texas Eastern") in a proceeding commenced by those two parties against The Dow Chemical Company ("Dow") in the District Court of Harris County for the 157th Judicial District of Texas. A copy of the Original Petition in that case filed February 7, 1975, is annexed to this affidavit as Exhibit A.

2. I make this affidavit in opposition to Dow's motion brought on by Order to Show Cause, signed by this Court on March 4, 1975 and served on my co-counsel in the Texas proceeding on March 5, 1975, directing my clients to show cause before this Court on March 6, 1975, why an order should not be made, pursuant to Title 28 of the United States Code, §2283, enjoining the District Court of Harris

County for the 157th Judicial District of Texas from proceeding with the action heretofore commenced by Texas Eastern in that Court.*

3. I find it extraordinary that counsel for Dow should, in his affidavit in support of the Order to Show Cause, refer to the $135 million property damage action commenced by Texas Eastern as being "commenced merely to harass and vex defendant The Dow Chemical Company." (Affidavit of Leonard Rivkin at p. 4.) The three separate firms of attorneys which represent Texas Eastern's interests in that proceeding have not lent their names to the twenty-five paragraph petition filed in the Court of Harris County in order to harass Dow, but rather for the purpose of collecting from that company the multi-million dollar damage done to Texas Eastern's LNG facility in Staten Island as a result of the inherently defective and extraordinarily dangerous polyurethane product which was sold by Dow for installation in Texas Eastern's LNG tank. As a result of the disastrous fire caused by Dow's product, Texas Eastern suffered a total loss of its multi-million dollar cryogenic storage tank on Staten Island and a multi-million dollar investment in the surrounding facility has remained idle for a period in excess of two years. The suggestion that

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* While the order sought by Dow is in form an injunction restraining these defendants from proceeding in the District Court in Harris County, it is well recognized that the actual nature of the injunction sought by Dow is that of an injunction by a Federal court to restrain the court of a state. *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4 (1940); *Hill* v. *Martin*, 296 U.S. 393 (1936); *Essanay Film Manufacturing Company* v. *Kane*, 258 U.S. 358 (1922); *H. J. Heinz* v. *Owens*, 189 F.2d (9th Cir. 1951), *cert. denied*, 343 U.S. 905 (1952).

Affidavit of Ben G. Sewell in Opposition to Motion for Stay of Texas Property Damage Proceeding

Texas Eastern must sit by until all of the personal injury suits are completed before it can take any steps to bring Dow to account for the property damage is absurd. Even if there were a legal basis for such a stay, which there is not, the injury to Texas Eastern from a grant of the stay sought in this case is plain: litigation concerning Dow's responsibility for the damage to property done by the fire and concerning the extent of such damage would not be resolved for years.

4. The list of considerations set forth at page 3 and 4 of the affidavit of Dow's attorney in support of its application for the Order to Show Cause has, as shown in the accompanying Memorandum of Law, no relevance or weight whatsoever with respect to the issue placed before this Court in Dow's application: whether the very authority of the Federal court is threatened by the prosecution of the State cause of action. See *Vernitron Corp.* v. *Benjamin,* 440 F.2d (2d Cir.), *cert. denied,* 402 U.S. 987 (1971). Nevertheless, the following comments may be made with respect to the considerations listed in the Dow attorney's affidavit, in order in which they appear in that affidavit.

(1) The causes of action set forth in the Petition in the State Court in Texas are for direct and consequential damages to property and for punitive damages arising out of Dow's breach of contract, false, deceptive and misleading misrepresentations, product liability based on the inherently dangerous defect in the Dow product, gross negligence, ordinary negligence and breach of warranty. As I understand it, the causes of action set forth in the cross-claims

and the personal injury litigation in this Court are for indemnification and contribution based on the fact that the death of plaintiff's decedent was the fault of The Dow Chemical Company wholly or in part.

(2) The incident upon which the Texas action is based is the destruction of Texas Eastern's cryogenic tank on Staten Island and the consequential deprivation of use of that tank for a period in excess of two years. The incident upon which the actions pending in this Court is based is the death of plaintiff's decedent.

(3) The State Court action in Texas, when it was commenced, was commenced not to harass but in order to avoid questions concerning the statute of limitations. Had Texas Eastern failed to commence that action, it is unthinkable that Dow would permit it to be commenced following the termination of the personal injury actions on the theory that earlier commencement of the action would have harassed Dow.

(4) The fact that the first of the personal injury actions has been ordered to commence trial within three months and that discovery proceedings are underway should militate against Dow's application rather than for it. It is exceedingly unlikely under Texas practice that the property damage litigation can be brought to trial within that time.

(5) The Texas court action does not involve the very same parties as are involved in this action. Most obviously, plaintiffs in the personal injury actions are not involved in the property damage litigation. Texas Eastern

has, to date, stated no cause of action against any party other than Dow in the Texas action and Dow has not brought into the Texas action any of the other parties who are co-defendants with it in the personal injury actions.

(6) The State Court in Texas clearly has jurisdiction over The Dow Chemical Company and Dow has not contested the State Court's jurisdiction. Not only was the contract for the sale of polyurethane at issue in this case entered into in Texas through Dow's Houston sale office, but also Dow maintains large manufacturing facilities within that State. Numerous other parties to the personal injury actions are either Texas corporations or maintain their principal or other places of business in the State of Texas. Dow has neither attempted to bring in other parties before the Texas court nor shown any basis for liability for Texas Eastern's property damage by parties not subject to the jurisdiction of the Texas courts.

(7) The seventh consideration set forth in the list which appears at pages 3 and 4 of the Dow attorney's affidavit is simply based on a misapprehension of law which is discussed in the accompanying Memorandum. It is my understanding that no judgment has been rendered to date in the personal injury actions and no showing has been made that the State Courts of Texas will not give appropriate res judicata effect to any judgment when it is rendered.

(8) Not only are numerous witnesses associated with Texas Eastern located in Texas but most, if not all, of the witnesses associated with Dow are located in or subject to the jurisdiction of the Texas Court.

Affidavit of Ben G. Sewell in Opposition to Motion for Stay of Texas Property Damage Proceeding

(9) The fact that both parties to the Texas action are Delaware corporations has no bearing on Dow's application, since Texas Eastern's principal place of business is in Texas and since Dow maintains major sales and manufacturing offices in that State.

(10) The statement that the issues before this Court would settle all issues as to liability arising out of the fire, which occurred on February 10, 1973 at the Staten Island LNG tank, is simply wrong. Issues as to liability for property damage are plainly separate and distinct from issues as to the extent to which Dow contributed, in whole or in part, to the death of plaintiff's decedent.

(11) If at any time Dow feels that it is being harassed and vexed in the Texas State Court action, it has remedies before the Courts of that State to prevent such misuse of that tribunal's powers. Dow has made no application for protection to the State Court in Texas and Texas Eastern has given it no ground for such an application.

(12) This Court will recognize that there are interests protected by the Federal system and the choice of forum allowed under that system which not only permit but compel Texas Eastern to resort to the courts of its home state to bring Dow to account for the massive injury to property which Dow has brought about by the sale in Texas of its inherently defective product. I have had an opportunity to glance through the numerous newspaper articles generated by this disastrous fire in the New York newspapers and I have been made aware by New York counsel of the problems of potential prejudice faced by my clients in de-

fending against or prosecuting claims in the Federal or local courts of New York State. What justice requires and permits in the circumstances of this case is that my clients be allowed free access to the courts in the forum of their choosing.

WHEREFORE, for the reasons set forth herein and in the accompanying Memorandum of Law, it is respectfully requested that this Court deny the preliminary and permanent injunction requested by The Dow Chemical Company prohibiting Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. and the District Court of Harris County for the 157th Judicial District of Texas from proceeding with the action commenced against The Dow Chemical Company on February 7, 1975 in that Court.

/s/ BEN G. SEWELL

[Jurat omitted in printing.]

EXHIBIT A ANNEXED TO AFFIDAVIT
OF BEN G. SEWELL

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
15786 JUDICIAL DISTRICT
No. 1,013,628

TEXAS EASTERN TRANSMISSION CORPORATION and
TEXAS EASTERN CRYOGENICS, INC.,
Plaintiffs,

VS.

THE DOW CHEMICAL COMPANY,
Defendant.

PLAINTIFF'S ORIGINAL PETITION

COME NOW Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc., hereinafter sometimes called plaintiffs, complaining of The Dow Chemical Company, defendant, and for cause of action would respectfully show the Court and Jury as follows:

I.

Plaintiff Texas Eastern Transmission Corporation [hereinafter sometimes called "Transmission"] is a Delaware corporation duly qualified to transact business in the State of Texas and having its principal offices and place of business in Houston, Harris County, Texas. Transmission is engaged in the business of transmitting and storing gas

and related products in and between the southwestern and northeastern United States.

II.

Plaintiff Texas Eastern Cryogenics, Inc. [hereinafter sometimes called "Cryogenics"] is a wholly-owned subsidiary of Transmission, incorporated under the laws of the State of Delaware but, like its parent, authorized to transact business in the State of Texas and having its principal offices in Houston, Harris County, Texas. Cryogenics is the owner of a storage tank for liquified natural gas [hereinafter sometimes called "LNG"] and related facilities located in New York City, New York.

III.

Defendant The Dow Chemical Company [hereinafter "Dow"] is a Delaware corporation engaged in the conduct of business through offices in Houston, Harris County, Texas, and engaged, inter alia, in the business of designing, manufacturing and marketing plastic urethane and other chemical products. The registered agent for service of process of The Dow Chemical Company is C.T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas, at which place service of process may be effected.

IV.

In or about 1960, plaintiff Transmission conceived the plan and intention to explore the possibility of constructing a suitable vessel to store large volumes of liquified

natural gas (LNG) at a temperature of —260° Fahrenheit to meet peak winter demands for that product in the northeastern United States. To investigate that possibility, plaintiff Transmission employed Battelle Memorial Institute ["Battelle"], a nonprofit corporation, to analyze the problems of storing large volumes of LNG at extremely low temperatures and to develop a design for a suitable LNG storage facility.

V.

Thereafter, in or about April of 1964, Battelle transmitted to plaintiff Transmission a report entitled "Design of a Large Storage Tank for Liquified Natural Gas" and in or about August of 1964, a report entitled "Construction and Testing of a Model LNG Storage Tank", which elaborated upon the research and development of the design and materials selected and recommended by Battelle including, specifically, the selection of appropriate insulation material and the design of an appropriate insulation system utilizing a rigid plastic urethane foam conceived, designed manufactured and marketed by defendant Dow. The selection of Dow's urethane foam was based upon communications, consultation and advice from defendant Dow with respect to the nature and characteristics of its urethane foam and, specifically, its representation that such foam was "self-extinguishing", "flame retardant", "non-burning" and/or "non-combustible" and therefore merchantable within the meaning of the Texas Business Commerce Code and suitable for the purpose of insulating the interior surfaces of a large cryogenic storage tank for LNG.

Exhibit A Annexed to Affidavit of Ben G. Sewell

VI.

As a result of the foregoing, plaintiff Transmission decided to undertake the construction of a cryogenic tank for the storage of LNG in the New York metropolitan area to be used for the purpose of meeting peak demand for natural gas in the northeastern United States. Plaintiff Cryogenics, a wholly-owned subsidiary of Transmission, was designated to be owner and operator of the cryogenic tank and related facilities to be constructed in Staten Island, New York.

VII.

At or about the same time, plaintiff Transmission retained Brown & Root, Inc. ["Brown & Root"] as general contractor for the construction of the LNG storage tank and related facilities. As part of its function as contractor, Brown & Root agreed to purchase the materials required for the construction of the cryogenic tank.

VIII.

During 1965, Brown & Root, pursuant to its agreement, began a consideration of the purchase of various urethane foam insulations for use in connection with the construction of the LNG storage tank and specifically its consideration of urethane foam insulation manufactured and marketed by defendant Dow. In connection with this consideration, Brown & Root consulted with and received communications and advice from Dow with respect to the design, formation, utilization and characteristics of urethane insulation material.

Exhibit A Annexed to Affidavit of Ben G. Sewell

IX.

As a result of these communications, consultation and advice, during 1965 and 1966, Brown & Root developed a specification for the insulation material to be used in the cryogenic storage tank requiring the insulation to be a urethane foam board manufactured by defendant Dow or the equivalent of such a urethane foam board.

X.

On or about January 30, 1967, Brown & Root directed a letter of inquiry from Houston, Texas, to Dow at Houston, Texas, and others seeking bids with respect to approximately 1,700,000 board feet of insulation material to be used to insulate the cryogenic storage tank. In response, defendant Dow submitted a bid to Brown & Root in Houston, Texas, with respect to a urethane foam manufactured by it which was accepted.

XI.

Thereafter, in the period 1968 through 1969, approximately 1,748,000 board feet of Dow urethane foam insulation board was delivered to the construction project and installed as insulation material along the interior walls of the storage tank. This foam insulation board was installed in the same condition in which it was sold and delivered by defendant Dow.

XII.

During the course of installation, plaintiffs received communications, consultation and advice from defendant

Dow with respect to the nature and characteristics of its urethane foam insulation and, specifically, with respect to its rate of flame spread, means of fire extinguishment and fire hazards to tank occupants.

XIII.

In or about August of 1970, the cryogenic storage tank was placed in operation and continued in operation until April of 1972, when the tank was taken out of service to permit necessary repairs.

XIV.

In the course of the repair operations, on or about February 10, 1973, a fire of unknown origin ignited the urethane foam insulation material designed, manufactured and supplied by Dow which thereafter burned in a fashion which could not be controlled by ordinary means of fire control. This fire resulted in the collapse of the 1,000,000 pound concrete roof of the tank and in other damage to the plaintiffs in a total amount in excess of $45,000,000.00.

XV.

Plaintiffs would respectfully show that their property damage, loss of profits and other damages were proximately caused by the negligence, breach of warranty and breach of contract of defendant Dow.

XVI.

Plaintiffs would further show that the urethane foam insulation designed, manufactured and marketed by defen-

dant Dow and installed in plaintiffs' cryogenic storage tank was, at the time it was sold by the defendant for use in plaintiffs' tank, inherently defective and unreasonably dangerous to life and property in that, because of its design, method of manufacture and method of marketing, it involved an extreme, unreasonable and undisclosed risk of damage, loss or injury by fire to persons and to property.

XVII.

In connection with the design, manufacture and marketing of defendant Dow's urethane foam insulation, Dow was guilty of negligence and careless acts and omissions proximately causing plaintiffs' damages in the following respects, among others:

1. Dow failed to research, develop, formulate, design and manufacture its urethane product with reasonable care and consequently produced a product, which, when applied to the interior vertical surfaces of a large cryogenic storage tank and accidentally ignited during construction or repair, created a fire which could not be controlled by ordinary fire-fighting techniques;

2. Dow failed to develop and conduct such tests as were reasonably required to determine the true burning characteristics of its urethane products, especially with respect to their burning characteristics when used to insulate vertical interior surfaces such as those in a large cryogenic storage tank; and

Exhibit A Annexed to Affidavit of Ben G. Sewell

3. Dow failed to warn users of its product concerning the burning characteristics of its urethane foam insulation in such manner as would put users on notice of the true burning characteristics of its product when used to insulate vessels such as a large cryogenic storage tank.

XVIII.

Further, in selling its urethane insulation and in its communications, consultation and advice with respect thereto, Dow expressly and impliedly warranted that its urethane foam insulation was merchantable and that it was suitable and fit for the express purpose of application as an insulating material for a cryogenic storage tank. At the time of such sale and such communications, consultation and advice, Dow knew the purpose for which the insulating material was required and Dow further knew that the purchasers were relying on Dow's skill and judgment to select and furnish suitable goods. Dow thus expressly and impliedly warranted that its urethane foam insulation was fit and suitable for installation in plaintiffs' LNG storage facility. In fact, as hereinabove alleged, defendant Dow's urethane foam insulation was unmerchantable, unsuitable and unfit for use as an insulating material in a large cryogenic storage tank since it could be easily ignited in routine and foreseeable construction and repair activities and since, once ignited, it could not be extinguished with ordinary firefighting techniques and materials, as a direct and proximate result of which, plaintiffs have been damaged as hereinabove and hereinbelow more fully described.

Exhibit A Annexed to Affidavit of Ben G. Sewell

XIX.

As the designer, developer, manufacturer and seller of its urethane foam insulation, Dow is strictly liable to plaintiffs who were not aware of the defects in the product or the negligent design thereof, who were using defendant's product in a reasonable foreseeable manner and who were damaged as a proximate result of the fact that Dow's urethane foam was subject to ignition in routine construction and repair activities and, once ignited, was not subject to being controlled with ordinary firefighting techniques and materials.

XX.

Further, defendant's liability to plaintiffs extends beyond mere negligence, breach of warranty and breach of contract. Plaintiffs would respectfully show that during the period from January 1, 1960, through February 10, 1973, defendant Dow falsely, fraudulently and deceitfully represented, both orally and in writing, to plaintiffs, and others:

1. That its urethane foam insulation was suitable for use as insulation on the interior surfaces of a large cryogenic storage tank;

2. That its urethane foam insulation was "self-extinguishing", "flame-retardant", "non-burning", and/or "non-combustible";

3. That Dow's urethane foam insulation burned on the surface only, with no smoldering and was easily extinguished with water or with CO2;

4. That the flame spread rate in inches per minute of its urethane foam insulation was "non-burning";

5. That the flame spread rate of its urethane foam insulation, when measured by Test E84 of the American Society of Test Materials ["ASTM"] was 65% of that of red oak flooring and that its smoke density factor was 183% of that of red oak flooring, and that such insulation, when burning, was no more toxic than burning wood;

6. That the flame spread rate of Dow's urethane foam insulation was that of a Class B interior finish within the classification established by the National Fire Protective Association ["NFPA"] Life Safety Code.

7. That ASTM Tests E84, D-1692-59T, and D-1692-67 were appropriate tests for testing the burning characteristics of in excess of 1,700,000 board feet of urethane foam insulation when installed in a large cryogenic storage tank.

XXI.

At the time each of the above statements were made, defendant Dow knew or in the exercise of reasonable care should have known that such representations were false, deceptive and misleading and, subsequent to February 10, 1973, defendant Dow agreed that it would cease and desist from using, publishing or disseminating, or encouraging others to use, publish or disseminate, directly or indirectly, orally or in writing, whether or not in conjunction with or

with reference to any test or standards, such descriptive terminology or expressions as: "non-burning", "self-extinguishing", "non-combustible", or any other term, expression, product designation or trade name of substantially the same meaning in connection with the promotion or in commerce within the United States of its urethane insulation theretofore developed by it.

XXII.

Further, at the time each of the above statements were made, defendant Dow knew or in the exercise of reasonable care should have known that such representations failed to disclose that its insulation was not suitable as insulation on the interior surfaces of a large cryogenic storage tank; that such insulation, if ignited during construction or repair, would burn uncontrollably and in a fashion so as not to be extinguishable with water, CO_2 or ordinary firefighting techniques; that such insulation was in fact not self-extinguishing, fire-retardant, non-burning or non-combustible; that ASTM Test D-1692 is not designed to test the burning rate of any plastic insulation material; that the flame spread rate of such insulation, when tested according to ASTM Test E84 was, in fact, substantially in excess of 65% of that of red oak flooring and had a smoke density factor substantially in excess of 183% of that of red oak; that such ASTM Tests were, in any event, inappropriate means of testing the burning characteristics of urethane insulation when ignited during construction or repair work on the interior vertical surfaces of a large cryogenic storage tank; that such insulation, when burning, resulted in prod-

acts of combustion considerably more toxic than those of burning wood; that its urethane foam insulation was not a Class B interior finish within the classification established by the NFPA Life Safety Code; and that such insulation in fact, represented an extraordinary danger when exposed to heat, flame or other sources of ignition during construction or repair work.

XXIII.

Plaintiffs relied, as defendant knew or should have known and, in fact, as defendant intended that they should, upon defendant's representations to plaintiffs and others, all of which such representations were either known or should have been known by Dow to be false at the time they were made. As a direct and proximate result of their reliance on the above enumerated false, fraudulent and deceitful representations, plaintiffs have been damaged as hereinabove and hereinafter more fully described.

XXIII.

The conduct of Dow described herein was not merely negligence, contract breach, breach of its warranty obligations and intentional fraud but also of such a character of wilfulness, wantoness, and recklessness to render Dow [illegible]lty of gross negligence.

XXIV.

Dow's gross negligence and intentional misconduct gives rise to a right in plaintiffs to recover punitive damages. Plaintiffs respectfully assert their right to recover such

punitive damages in an amount to be set by the Court and Jury taking into consideration Dow's size and wealth and the character of its misconduct such that any award of punitive damages would not merely be sufficiently substantial to deter Dow from such misconduct in the future, but would also serve as an example in the industry of the consequences of gross negligence and intentional misrepresentation of the characteristics of products upon which the safety, lives and property of others depend.

XXV.

Plaintiffs would respectfully show that in addition to the other damages sustained by plaintiffs, as a further and foreseeable consequence of defendant's negligence, breach of contract, breach of warranty and fraud, plaintiffs have been unable to complete the repair of the tank and to return it to operation in the spring of 1973 as it otherwise would have done and plaintiffs have not been able to operate the tank since that time to their further damage in an amount yet to be fully calculated.

WHEREFORE, premises considered, plaintiffs pray that defendant Dow be cited to appear and answer herein and that upon final trial hereof plaintiffs have and recover of and from the defendant its actual damages in an amount in excess of $45,000,000.00 punitive damages in an amount of at least two times that sum, or $90,000,000.00, their costs of court and such other and further relief, both

general and special, legal and equitable, as to which plaintiffs may show themselves justly entitled.

Respectfully submitted,

SEWELL, JUNELL & RIGGS

By /s/ J. EUGENE CLEMENTS
J. EUGENE CLEMENTS and
BEN G. SEWELL
701 Capital National Bank Building
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224-5704
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140 Broadway
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CLAUSEN, MILLER, GORMAN, CAFFREY
& WITOUS
135 South LaSalle Street
Chicago, Illinois 60603

Unsigned Order to Show Cause Dated March 10, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

UPON READING AND FILING the affidavit of Leonard L. Rivkin, Esq., duly sworn to the 10th day of March, 1975, and upon all the pleadings and proceedings had herein.

LET all the parties to the instant Order to Show Cause appear before this Court before Honorable Mark A. Constantino at the United States District Courthouse for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York on the 14th day of March, 1975, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, and show cause

WHY an Order should not be made herein, pursuant to Rule 65 (b) FRCP, restraining the defendant Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. from proceeding to conduct any depositions or examinations or discovery proceedings of any kind or nature pursuant to any Court Order issued out of Harris County District Court, Texas, in an action by said defendants against The Dow Chemical Company; and

PENDING the hearing and determination of this motion against the defendant Texas Eastern Transmission Corp., and Texas Eastern Cryogenics Inc., said defendants are herein and hereby temporarily restrained from proceeding

against The Dow Chemical Company in any discovery proceedings of any kind or nature ordered by the State Court in Harris County District Court, Texas; and

Sufficient cause having appeared therefor, let service of a copy of this Order, with its supporting papers be served personally upon LeBoeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York and Mendes & Mount, Esqs., 27 William Street, New York, New York, on or before the 11th day of March, 1975 and be deemed sufficient.

Dated: March 10, 1975

.....

Judge of United States District Court

Affidavit of Leonard L. Rivkin in Support of Motion to Restrain Defendant From Taking Depositions

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NASSAU, *ss.*:

LEONARD L. RIVKIN, being duly sworn, deposes and says:

That your deponent is an attorney and counsellor at law and a partner in the firms of Rivkin, Leff & Sherman, Esqs., attorneys for the defendant The Dow Chemical Company and is fully familiar with the facts as hereinafter set forth.

That your deponent submits that the very fears and concerns which were argued before this Court but a few days ago have now come to fruition.

Within a day subsequent to the appearance of your deponent before this Court, where we argued in support of an injunction, we were advised by our Houston attorneys that a State Court Judge in Houston, Texas has Ordered the appearance of three Dow employees for depositions and Discovery and Inspection on March 21, 1975, at Houston, Texas in the action referred to in the prior injunction presently pending before this Court.

That your deponent has been advised and represents to this Court that on March 4, 1975, Judge Arthur F. Lesher, Jr., in the Harris County District Court, Texas, issued an

Affidavit of Leonard L. Rivkin in Support of Motion to Restrain Defendant From Taking Depositions

Ex parte Order requiring the attendance of William K. Greenleaf, William A. Dunlap, and Gary D. Miller, all Dow employees, to appear for the depositions and Discovery and Inspection in the State Court action on March 21, 1975.

These above mentioned three persons are in fact vital and necessary to the continued defense by The Dow Chemical Company of the suit before this Court. These three aforementioned men are aiding in the present Discovery and Inspection proceedings now pending before your Honor; that they are to be produced in the depositions which your Honor has Ordered to follow the Discovery and Inspection proceedings and the three men are necessary and vital as consultants to your deponent in the defense of this action.

That all of the documents which have been Ordered to be produced in Texas on March 21, 1975, are even now being produced to all of the parties in the action before this very Court and must be retained by your deponent in order to adequately defend the interests of my client before your Honor.

Without the availability of the aforementioned three people to this office, we cannot adequately comply with your Honor's Orders to proceed expeditiously on Discovery, Interrogatories, Depositions and Trial. We will suffer irreparable harm and could conceivably be held in contempt by not being able to proceed pursuant to your Honor's prior Orders. Not only will we suffer irreparable injury but we will suffer immediate injury in the defense of the action before your Honor.

Your deponent certifies to this Court that his Houston attorneys have requested an extension of time to Answer

the State Court action in Texas and this has been denied unless we submit the aforementioned three people to deposition—which is impossible to do and properly defend the suit before your Honor.

That your deponent has brought this request by way of Order to Show Cause due to the obvious imminence of time and no other application has been made for the explicit relief requested herein.

That your deponent has requested a Temporary Restraining Order due to the irreparable harm that will be occasions to The Dow Chemical Company in the defense of the suit before this Court.

That the ultimate relief requested herein is for a Permanent Restraining Order which will restrain Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. from attempting to obtain and enforce any Discovery proceedings by virtue of Order or otherwise against The Dow Chemical Company in the State Court action in Texas. The three aforementioned men and the documents Ordered to be produced in the State Court action are vital and actually needed for the present discovery proceedings before this Court and to aid your deponent in the defense of this trial, which has been Ordered for June 2, 1975. It is, therefore, respectfully requested that the Restraining Order be in effect until the depositions and the trial of the instant matter have been culminated before this Court.

It is submitted that service of a copy of the instant papers upon Mendes & Mount, Esqs., with offices at 27 William Street, New York, New York, attorneys for Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc. in the instant case, as well as LeBoeuf, Lamb, Leiby & Mac-

Affidavit of Leonard L. Rivkin in Support of Motion to Restrain Defendant From Taking Depositions

Rae, Esqs., with offices at 140 Broadway, New York, New York, who are the attorneys of record in the State Court action aforementioned be deemed sufficient for service on Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc.

WHEREFORE, it is respectfully requested that a Temporary and Permanent Restraining Order as aforementioned be granted.

/s/ LEONARD L. RIVKIN

[Jurat omitted in printing.]

Transcript of Hearing of March 10, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

United States Court House
Brooklyn, New York

March 10, 1975
10:00 o'clock A.M.

Before:

HONORABLE MARK A. COSTANTINO,
U.S.D.J.

Appearances:

RIVKIN, LEFF & SHERMAN, Esq.,
Attorneys for defendant Dow Chemical Co.

By: LEONARD RIVKIN, Esq.

LE BOEUF, LAMB, LIEBY & MCCRAE, Esq.,
Attorneys for Texas Eastern

By: CHARLES A. SIFTON, Esq.

Mr. Rivkin: Leonard Rivkin of Rivkin, Leff & Sherman, for the defendant Dow Chemical Company, and my adversary is Charles Sifton—

Mr. Sifton: Le Boeuf, Lamb, Lieby & McCrae.

Transcript of Hearing of March 10, 1975

Mr. Rivkin: I am counsel for Dow, and he is counsel for Texas Eastern Transmission Corp., & Texas Eastern Cryogenics, Inc.

If your Honor please, when I first presented the papers before you this morning, it was in the form of an Order to Show Cause, with supporting affidavits, for a temporary restraining order, and then a permanent order restraining Texas Eastern Transmission and Texas Eastern Cryogenics from proceeding in the State of Texas against Dow Chemical Company.

I won't clutter the record with the details of that because there is different relief causing your Honor to be familiar with the Texas proceedings.

I thought we would go by way of Order to Show Cause and a hearing, but I submit that as long as counsel is before you, that this be the argument on the permanent restraining order.

May I say before this Court that Friday at 4:30, give or take a little bit, I was advised that the State Court of Texas issued an Order, ex parte, requiring Dow Chemical to produce three witnesses and records for the State Court action next week. I think it is Friday of next week. I am not sure of the exact date, but within a day or two of Friday of next week, and that was served on Dow's attorneys in Houston.

On behalf of Dow, may I say, that I cannot comply with your Court's ruling, and the Texas Court's ruling, and I may very well end up in contempt of somebody.

At this very minute, I have an associate handling discovery and inspection proceedings in Long Island, where Dow produced over 100,000, close to 150,000 documents,

pursuant to the agreement and Order of this Court, for our adversaries to look at.

Those very papers were called for in Texas next week, and three witnesses called for, by name, two of them are working with me as aides in defense of this case, technical aides, and the third one is partially helping with the expert witnesses.

All three of them are required for the defense of this case before your Honor. They are absolutely necessary, in fact.

Now, my problem is this: I have to know almost immediately what to do.

If I am going to comply with Texas' order, I have to get the papers down there, and you can assume 150,000 is a question, really, of collating them and bringing them down there, but I must have at least a week or ten days to prepare these witnesses for EBT's, because they are going to be questioned on the documents they want for D&I.

I must produce these papers in New York until discovery is complete, based on your Honor's rulings, and even after that, I have to prepare copies of the documents for my adversaries, and prepare my witnesses for the New York depositions following D&I, on the very papers Texas wants.

Among the papers ordered to be produced were the personal files of these three witnesses and many others. I must have those papers in New York to prepare my witnesses for the forthcoming trial before your Honor. I didn't think I have that much effort in me.

I represent to the Court I cannot go to trial in June and go down to Texas with the papers.

I ask your Honor to grant the stoppage of discovery in Texas of any kind, pending your case.

Mr. Sifton: I appear for Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc., and I appear solely with respect to the application for a temporary restraining order, of which I have had no notice.

I have a copy here from Mr. Rivkin, of his application, which—

The Court: You have had as much notice as I have had. How much more do you need?

Mr. Sifton: All you are being asked to sign today is an Order to Show Cause and Temporary Restraining Order.

The Court: No. You are being asked to let them continue their work here, and then go forward down there.

Mr. Sifton: I would like to confine my remarks for the proceeding, to the Temporary Restraining Order.

This is an application with regard to discovery, only.

The rules in this Court and in Texas as well, provide that on discovery, if there be problems, one should try to resolve them with one's adversary.

There has been no attempt by Mr. Rivkin to reschedule the date. I am sure we can reach some arrangement so he will not be in the difficulty he says he is in.

He has also made no application to the Texas Court for any relief from this Order.

Now, your Honor, I would suggest there are two weeks before—

The Court: Do you think he will get any relief in the Texas Court on an ex parte order?

Mr. Sifton: Certainly.

Transcript of Hearing of March 10, 1975

The Court: The Judge is going to say, "Judge Costantino is in New York, and I'm here in Texas, in Houston, in the State Court, and we are separate entities."

Mr. Sifton: He is going to say, "If you can't produce the documents in Texas because they are being produced in New York"—

The Court: No. I'll take the bull by the horn and do it here.

It is going to be a confrontation of jurisdiction, and I don't intend to get involved in that. I intend to complete this case in June, and all discovery will be completed by that time, and then he can have everything he wants in Texas

This case has been here for two years, and I no longer want any delays in this case.

Mr. Sifton: I think you are being asked to become involved in a conflict of jurisdiction, which is wholly unnecessary.

The Court: I said, "a confrontation," not "conflict."

Mr. Sifton: May I suggest, on the record, that if the damage attorneys are permitted to participate in the depositions and discovery going on in your case, we wouldn't have this conflict.

The Court: You can take the Texas case and make it part of the case in New York, and have all the discovery you desire.

I will sign an order now joining issue—

Mr. Sifton: A step of that sort is not necessary.

There is a preliminary step to be taken in this proceeding which would, it seems to me, render wholly unnecessary the relief applied for here.

I am willing to sit down and discuss with Mr. Rivkin some arrangement so we can avoid the conflict, and I am willing to do that, there is no basis for him saying he is faced with immediate and irreparable injury.

The Court: If he must comply with my Order—and we are at a point where discovery will be speedily entered into by all parties, including the Plaintiff—then he must divide himself and his office and his material between here and Texas, and I don't think that is helping the situation at all.

Mr. Sifton: I am suggesting that the property damage lawyers will come up here to New York, will participate in his discovery, will sit down in his depositions, participate in those depositions, and in that manner, it would seem to me, his problems would be entirely dissipated.

Mr. Rivkin: Then let them join, sir. Otherwise, we are wasting your Honor's time.

Mr. Sifton: We don't have to join the entire action, and there are good reasons—

The Court: I don't want to know the reasons. One reason is 2200 miles from here.

Mr. Sifton: My clients have read the newspapers in this jurisdiction, and they are aware of a jury trial—

Mr. Rivkin: I waived. They refused to waive. They refused to waive the jury. I offered to—

Mr. Sifton: Let me just finish my statement on the record.

Mr Rivkin: I am sorry, Mr. Sifton, you are right.

Mr. Sifton: We don't have to bring the entire case up here.

Transcript of Hearing of March 10, 1975

It seems to me the proposal I am making undercuts any basis for the kind of Order being applied for here.

Mr. Rivkin: Number one, if they come up here and participate, and they are not part of the court case, they'll only delay the discovery for what is before your Honor. . If Mr. Sifton wants to agree with me informally, and then put in papers, if he tells me that he won't bother me until this case is over before your Honor— It is not even a question of manpower. I have manpower, but the documents cannot be in two places at once.

The Court: Well, he is suggesting that the lawyers come in from Texas.

Mr. Rivkin: Then I have to stay with them and spend extra time, and I can't go on the EBT's your Honor ordered, or what if they want to participate?

Mr. Sifton: There are already many people involved in the EBT's. What are a few more individuals?

Mr. Rivkin: What if there is a ruling needed?

Mr. Sifton: We will go to Texas.

The Court: I know that.

Mr. Sifton: We can have the attorneys get their rulings in Texas.

The Court: Isn't that semantic duplicity?

Mr. Sifton: No. It is a very distinct 125 million dollar case, separate and apart.

Mr. Rivkin: Your Honor, if I go down there, the Judge is going to say, "Judge Costantino can take care of this," and in addition, we were told that that case wouldn't be tried for a year and a half to two years.

The Court: Yes. I heard that. I heard that it would not be ready for two years.

I don't see the reason for duplicity of depositions or discovery.

Mr. Sifton: What is involved is a temporary restraining order in this case.

The Court: If you are going to talk that way, I am inclined to grant the temporary restraining order.

Mr. Sifton: Your Honor, we are trying to avoid a conflict between jurisdictions, and my manner of handling the matter seems to me, to avoid that.

The Court: If your Texas action is a joint action.

Mr. Sifton: Do I have to be forced to submit?

The Court: No, of course not. If you want to stay in Texas, and I have no objection, but I will run my Court as I see fit. You are not going to impose the jurisdiction of Texas on this Court, and you are not going to interfere wtih the discovery proceedings in New York by having an action in Texas interfere with this Court.

They have an absolute right to proceed here.

Mr. Rivkin: Maybe there is some argument that Mr. Sifton can show the Court as to why they need this information before June, with a two year delay.

Mr. Sifton: We have a two year delay, but we have to prepare a case down there. We have to begin now. The three witnesses we subpoenaed—

The Court: Why not wait and see what discovery reveals to you here, and see how much more discovery you need in order to prepare your case in Texas? Isn't that the better way?

Must you start from the beginning in two places, and have separate poles, and see if they come together?

Fairly and honestly, I cannot buy your argument. Your argument is one of delay.

Mr. Sifton: My argument merely asks that the property damage lawyers be allowed to participate in discovery.

The Court: No one can stop you from sitting in.

Mr. Rivkin: If you state that you are counsel to this case.

The Court: Exactly right.

You will hear the same thing as anyone else sitting in that discovery procedure.

Mr. Sifton: Can we ask questions?

The Court: No, not if your case is not joined. There is no jurisdiction, and I cannot direct it, nor can a Judge in Texas direct it.

Mr. Sifton: If we enter a stipulation that we resolve our difficulties by that manner—

Mr. Rivkin: Only if he joins the case.

The Court: I never involve myself in stipulations between lawyers or clients. It is none of my business. I don't care how you operate your office, or what you say to your clients. It is immaterial to me.

I just tell you that I do as I see fit on this bench, and that is how I am going to do it, and no other way.

Mr. Sifton: I don't understand the brunt of your Honor's remarks.

The Court: They have purpose to them, let me assure you.

Mr. Sifton: What I am suggesting is that Mr. Rivkin— The only injury he mentioned on the record— It wouldn't involve a conflict of jurisdiction, and it would allow both cases to proceed at their own pace, and I don't see how your

Honor can restrain the Texas Court from conducting its case in the manner in which it sees fit.

Mr. Rivkin: If they join by counter-claim or otherwise, their action in Texas, before your Honor, I will waive any objection to lack of timeliness. I would not object to the fact that we are coming up for a June trial, and they can sit in on discovery and ask questions. Then, I will not object. But here, I have two and a half months to prepare for trial, and they have two years, and they want me to let people come up and ask questions.

Mr. Sifton: He is asking me to give up a Texas jury trial.

Mr. Rivkin: I am only asking to stay the discovery until this case is over.

Mr. Sifton: This case has been pending for over two years.

The Court: Oh, but we have had many, many conferences involving at times forty-five attorneys, and whether certain defendants were involved, and who the defendants involved were, and the question of damages, and whether some of the defendants could be let out, and whether TETCO was a defendant. That was done to narrow the issues, and that is not wasting time.

In a case where there are forty people killed, with families, and each one of these families are probably saying, "Why is he taking so long?" and, "I hope he won't take much longer," they have a right to know what is happening.

Mr. Sifton: I suggest that the property damage litigation—

The Court: No. You suggest this case has gone on for two years. There are boxes full of work downstairs.

Mr. Sifton: Your Honor, you are inviting—

The Court: I am inviting nothing.

Mr. Sifton: Mr. Rivkin is inviting us to come up and add our litigation to all else that has gone on.

The Court: I see one thing occurring here.

You are not going to agree with the Court, and the Court won't accept your argument any further.

Mr. Sifton: I hope when you draft the temporary restraining order, stating the irreparable injury, I hope you will bear in mind—

Mr. Rivkin: No. I asked your Honor for an original restraining order because Texas counsel was before you. The temporary restraining order wouldn't help me now.

Mr. Sifton: We have not had the opportunity to prepare a brief as to whether or not your Honor has authority to restrain the Texas Court's asking for discovery.

The Court: It amazes me how when parties want more time the word "brief" comes up.

Are you going to brief whether or not I have a right to do this? Rule 65.

Mr. Sifton: Whether you have the right to restrain the Texas Court?

The Court: No. I am restraining TETCO from going forward: I do not intend to get involved with a jurisdictional confrontation with any jurisdiction in America.

There are people in this court who are plaintiffs and defendants, and I will issue each and every Order necessary in order to facilitate the case, and that is what I am doing in this case. There is no jurisdictional question with the Texas Court whatsoever. I am not in any way hampering their proceeding. They can do whatever they like.

Transcript of Hearing of March 10, 1975

Mr. Sifton: I will show you a case that illustrates that what you propose to do is restraining the Texas Court, and the Court in Texas will construe it that way.

The Court: No. So far as I am concerned, I am dealing with questions of the parties involved.

Mr. Rivkin: May I submit an Order tomorrow morning?

The Court: Yes, you may submit a Calendar Order if you wish.

Mr. Rivkin: I will submit a transcript of the argument to show the jurisdiction of the Court to issue the Order.

Mr. Sifton: There is going to be no hearing?

The Court: We just had argument. The minutes in this argument are considered the minutes of a hearing.

Mr. Sifton: May the record note that I objected to this being a hearing on the preliminary injunction, and ask for notice.

Mr. Rivkin: Notice only applies if he never had a chance to argue. He was before the Court voluntarily.

Mr. Sifton: I offered to speak to the temporary restraining order.

The Court: Have your permanent restraining Order on Wednesday morning. If you have additional argument, bring it in on Wednesday, and I'll listen to the balance of the argument.

Mr. Rivkin: I need not serve any more papers, then.

Mr. Sifton: Can we ask for security on the injunction?

Mr. Rivkin: I am not asking for a temporary.

The Court: Have your Orders ready Wednesday morning, and I'll hear more argument prior to signing the Order.

I suggest that you send another paper, another copy over to his office.

Mr. Rivkin: Yes, I will.

Affidavit of Charles P. Sifton in Opposition to Motion for Stay of Texas Discovery Proceedings

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CHARLES P. SIFTON, being duly sworn, deposes and says:

1. I am a partner in the firm of LeBoeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York, and one of the attorneys of record for Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. (herein collectively referred to as "Texas Eastern") in a proceeding commenced by those two parties against The Dow Chemical Company ("Dow") in the District Court of Harris County for the 157th Judicial District of Texas.

2. I make this affidavit in opposition to Dow's motion brought on by oral application to this Court on the morning of March 10, 1975 for an order restraining Texas Eastern from obtaining or enforcing any discovery proceedings against Dow in the state court action until the culmination of the trial of the instant matter before this Court. While in form the application is for an injunction pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, it is in fact an application for an injunction from this Court to

restrain the Texas courts, prohibited under the terms of Title 28 of the United States Code, Section 2283.*

Prior Proceedings in This Court

3. This is an action for conscious pain and suffering, breach of warranty and wrongful death arising out of the fire in Texas Eastern's cryogenic storage tank on Staten Island, New York, which occurred on February 10, 1973. Texas Eastern has been named as a defendant in this proceeding and its interests herein have been represented by the firm of Mendes & Mount, counsel designated by its personal injury insurers. Texas Eastern has in this action cross-claimed against Dow, the manufacturer and seller of the urethane insulating material which resulted in the February 10th fire, for contribution and indemnification on the ground that Dow is or may be liable, in whole or in part, for damages recovered by plaintiff against Texas Eastern.

4. Discovery proceedings are underway in the instant action. Texas Eastern has made available one witness for depositions in January and on February 24, 1975, its documents were made available for inspection and copying, pursuant to Order of this Court dated February 10, 1975, a copy of which is annexed hereto as Exhibit A. On March

* While the order sought by Dow is in form an injunction restraining these defendants from proceeding in the District Court in Harris County, it is well recognized that the actual nature of the injunction sought by Dow is that of an injunction by a federal court to restrain the court of a state. *Oklahoma Packing Co.* v. *Oklahoma Gas and Elec. Co.*, 309 U.S. 4 (1940); *Hill* v. *Martin*, 296 U.S. 393 (1936); *Essanay Film Manufacturing Company* v. *Kane*, 258 U.S. 358 (1922); *H. J. Heinz* v. *Owens*, 189 F.2d 505 (9th Cir. 1951), *cert. denied*, 343 U.S. 905 (1952).

10, 1975, pursuant to the same Order, production of documents by Dow commenced in Westbury, Long Island. I am informed by Mendes & Mount that representatives of Dow attending the document discovery expect that it will be completed on March 13, 1975. Pursuant to Orders of this Court, depositions will commence one week following the completion of discovery of Dow's documents and will occur in the order in which the defendants appear in the caption of this proceeding, so that depositions of defendant Dow will not occur until after the completion of the depositions of Texas Eastern, Brown & Root, Napp Grecco Company and Battelle Memorial Institute. In all likelihood, Dow's depositions will not occur before late April or May.

Prior Proceedings in the District Court for Harris County, Texas

5. On February 7, 1975, the proceeding referred to above was commenced by filing the Original Petition in the District Court for Harris County for the 157th Judicial District of Texas. In the Texas proceeding, Texas Eastern is represented by its own counsel, as well as counsel for the insurers of its property loss, and seeks to recover $135 million in connection with the damage of its cryogenic storage tank and associated facilities in Staten Island. The nature of that proceeding, as well as the Original Petition in that case, are set forth in the Affidavit of Ben G. Sewell, sworn to the 6th day of March, 1975, which is submitted herewith as Exhibit B.

6. On or about March 4, 1975, Texas Eastern applied to the Honorable Arthur F. Lesher, Jr., Presiding Judge in

Affidavit of Charles P. Sifton in Opposition to Motion for Stay of Texas Discovery Proceedings

Texas proceeding, for leave to take the depositions of three Dow employees under Rule 186(b) of the Texas Rules of Civil Procedure, and prior to the date on which answer was due in the Texas proceeding. Two of the three individuals whose depositions are sought by Judge Lesher's Order in this case were, upon information and belief, parties to an oral telephone conversation between Dow and Texas Eastern in which a number of oral representations were made by Dow concerning the alleged lack of danger from fire of Dow's product when being worked on by construction workers. The third individual is, upon information and belief, the person at Dow's Houston sales office who was responsible for the sale of Dow's defective product. It is, therefore, vital that these witnesses' testimony concerning these conversations be preserved at the earliest possible date.

7. Pursuant to Texas Eastern's request, on March 4, 1975, Judge Lesher ordered and directed that the oral depositions of the three named employees of Dow be taken commencing March 21, 1975. A copy of the plaintiff's application to take depositions and Judge Lesher's Order is annexed hereto as Exhibit C.

8. I am informed that Dow has retained the law firm of Bracewell and Patterson, First City National Bank Building, Houston, Texas, to represent it in the Texas action. However, no application has been made to the District Court for Harris County by Dow or its attorneys with respect to the aforementioned Order of Judge Lesher, although I am informed that the Texas Rules of Civil Procedure would permit such application. Nor has counsel for Dow, either in

New York or Texas, made any effort to contact counsel for Texas Eastern in Houston or New York to reschedule the date set by Judge Lesher for depositions. As I informed this Court at the time of Dow's original motion, Texas Eastern stands ready to agree to any reasonable adjournment of the deposition date or, indeed, to conduct depositions in connection with the Texas action at the same place as depositions conducted in the personal injury actions following their completion, or to make any other reasonable arrangement which will avoid unnecessary duplication of effort and inconvenience, but which will, at the same time, protect the independent interests of Texas Eastern in the property damage litigation.

9. The relief requested by Dow is, for the reasons set forth herein and in the Memorandum of Law accompanying this Affidavit and the prior Memorandum accompanying Mr. Sewell's Affidavit, prohibited by the terms of Title 28, United States Code, Section 2283. To enjoin the plaintiffs in the state court proceeding from conducting any discovery proceedings until the termination of the trial of this action is, in fact and in law, a stay of the state court proceeding, and none of the exceptions of Section 2283 apply in this case. There is no federal judgment to protect; there is no federal statute authorizing the injunction of a state court proceeding and the issuance of this Court's injunction is not necessary in order to aid its federal jurisdiction—a provision of Section 2283 designed to assure that state court proceedings will not continue after having been removed to a federal court.

Affidavit of Charles P. Sifton in Opposition to Motion for Stay of Texas Discovery Proceedings

10. Even if the relief sought by Dow were not prohibited by Section 2283, there are no equitable grounds for granting it in this case. To cut off all discovery in the Texas action until the trial of this action is a remedy out of all proportion to the claimed wrong. If Dow is put to some inconvenience by the March 21, 1975 date set forth in Judge Lesher's Order, Texas Eastern stands ready to find with Dow a suitable alternative date or even, if necessary, to accommodate itself to the schedule of discovery in the personal injury action. The injury to Texas Eastern, on the other hand, from granting of the relief sought by Dow is plain. It will be prohibited from going forward with the prosecution of its multi-million dollar property damage claim through attorneys of its own choosing in a forum in which it is entitled to proceed pending the completion of the trial of this case.

WHEREFORE, for the reasons set forth herein and in the accompanying Memorandum of Law, it is respectfully requested that the motion of The Dow Chemical Company for an order enjoining Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. from conducting discovery proceedings in the action now pending in the District Court of Harris County for the 157th Judicial District of Texas until the trial of this action has been completed be in all respects denied.

/s/ CHARLES P. SIFTON

[Jurat omitted in printing.]

EXHIBIT A ANNEXED TO AFFIDAVIT OF CHARLES P. SIFTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
U. S. Court House
223 Cadman Plaza East
Brooklyn, New York 11201

Chambers of
MARK A. COSTANTINO

February 10, 1975

TO ALL COUNSEL

Re: *Staten Island LNG Tank cases*

Dear Sirs:

All parties are hereby notified of the following two items:

(1) In that all parties to this action have not agreed to waive a jury trial on the issue of liability, the trial will be before a jury.

(2) I have ordered that the discovery schedule proceed as follows: On February 24, 1975, TETCO will make its documents available for examination in Shreveport, Louisiana. Discovery of those documents will continue until completed. After a sufficient and reasonable interval (to be worked out among counsel but not to exceed one week) discovery of Dow's documents will commence in Midland, Michigan and proceed to completion. One week after the completion of the Dow document search the deposition of

Exhibit A Annexed to Affidavit of Charles P. Sifton

TETCO will commence in New York. Further depositions will proceed as noticed after the TETCO deposition is completed.

I expect all parties to cooperate with each other to assure that discovery in this complex litigation is carried out in an expeditious and fair manner.

Sincerely yours,

/s/ MARK A. COSTANTINO
Mark A. Costantino
U.S.D.J.

[Exhibit B, consisting of the Affidavit of Ben G. Sewell dated March 6, 1975, is reprinted on page 22a of this Appendix.]

EXHIBIT C ANNEXED TO AFFIDAVIT OF CHARLES P. SIFTON

No. 1,013,628

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS

157TH JUDICIAL DISTRICT

TEXAS EASTERN TRANSMISSION CORPORATION and
TEXAS EASTERN CRYOGENICS, INC.,

—VS.—

THE DOW CHEMICAL COMPANY.

PLAINTIFFS' APPLICATION TO TAKE DEPOSITIONS UNDER RULE 186(b) OF THE TEXAS RULES OF CIVIL PROCEDURE

To the Honorable Arthur F. Lesher, Jr.:

COME NOW Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc., plaintiffs in the above entitled and numbered cause and, prior to the appearance of the defendant, apply for leave to take depositions under Rule 186(b) of the Texas Rules of Civil Procedure, and for good cause would respectfully show as follows:

I.

In this cause, plaintiffs have alleged their right to recover in excess of $135,000,000 in property damages, lost profits

and consequential damages from the defendant, resulting from an uncontrollable fire that occurred in plaintiffs' cryogenic storage tank for liquified natural gas located in Staten Island, New York. This fire was caused by defective and misrepresented polyurethane foam insulation manufactured and sold by defendant.

II.

Plaintiffs, defendant and others have been named as defendants in approximately forty (40) personal injury suits now pending in the state courts of New York and New Jersey and the federal courts of the Southern District of New York. Some but not all of the issues between these parties with respect to property damage may be also in issue in the personal injury suits in the federal and state courts of New York and New Jersey. These suits are rapidly proceeding to trial and the largest suit is now set for trial in June of 1975.

III.

In order to avoid the assertion that issues involved in this case or discovery required for this suit have been precluded by actions taken in any one or more of the suits pending in New York and/or New Jersey, plaintiffs must move forward on an expedited basis with their discovery. The defendant has already indicated an intention to delay proceedings by, for instance, an attempt to remove this case to federal court, an action which, being wholly improper, plaintiffs will be forced to contest by petition to remand. Plaintiffs assert, as defendant well knows, that the

process of obtaining a ruling on a petition to remand will be time-consuming and that the time lost in developing this case—particularly the crucial evidence sought from the witnesses more fully described below—may well be prejudicial to plaintiffs' assertion of rights in this lawsuit and to the expeditious, independent development of the facts involved in this suit.

IV.

It is therefore of the utmost urgency that, prior to any attempt to remove this cause and prior to the commencement of the contest as to whether this cause is properly brought in the State courts of Texas, discovery should commence at the earliest possible date so that discovery may continue without prejudice or waiver of rights. Both the Federal Rules of Civil Procedure and the Texas Rules of Civil Procedure envisage and require that the parties be encouraged to commence discovery at the earliest possible date and that procedural gamesmanship be discouraged as a device to avoid and frustrate discovery or to require litigation of issues in improper, removed fora where all of the relevant the issues between the parties are not properly placed in dispute, where different standards of care and burdens of proof are applicable and where irrelevant and extraneous parties and issues are involved which may cloud the resolution of fundamental, underlying issues between the parties before this Court.

V.

Moreover, your plaintiff has reason to fear that certain crucial and vital witnesses, to-wit: William K. Greenleaf,

of Houston, Texas, William A. Dunlap, of Midland, Michigan, and Gary D. Miller of Midland, Michigan, may absent or secrete themselves or may otherwise become unavailable for discovery if such parties, all of whom are employees of the defendant, are not properly subjected to notice and subpoena in accordance with Rule 186(b) of the Texas Rules of Civil Procedure.

VI.

Plaintiffs do not seek to obtain any improper advantage or to subject the defendant to harassment or unreasonable expense or inconvenience. Plaintiffs give notice of their willingness to make themselves and their counsel available either in Houston, Harris County, Texas, where this case is filed, or, in the case of the two witnesses whom plaintiffs understand to reside in Midland, Michigan, to take such depositions in Midland, Michigan, but plaintiffs underscore the necessity for prompt and speedy action in scheduling these depositions, by appropriate leave of court, at a reasonable time in the very near future.

VII.

Plaintiffs offer to make themselves and their counsel available to take the depositions in accordance with the following schedule either in Houston, Texas, or in Midland, Michigan:

1. Mr. William K. Greenleaf: 9:00 a.m. Friday, March 21, 1975.

2. Mr. William A. Dunlap: 9:00 a.m. Monday, March 24, 1975.

Exhibit C Annexed to Affidavit of Charles P. Sifton

3. Mr. Gary D. Miller: 9:00 a.m. Tuesday, March 25, 1975.

VIII.

Because of the great need to commence discovery in this cause on an independent basis, to prevent the frustration of plaintiffs' right to discovery and to protect themselves and to facilitate the prompt, speedy and orderly disposition of the matters in litigation herein, plaintiffs respectfully move the Court to grant leave that the aforesaid depositions be taken at the time and on the dates requested above in a city to be designated by the defendant and for such other and further relief, both general and special, legal and equitable, as to which plaintiffs may show themselves justly entitled.

Respectfully submitted,

SEWELL, JUNELL & RIGGS

By /s/ J. E. CLEMENTS
J. EUGENE CLEMENTS
701 Capital National Bank Bldg.
Houston, Texas 77002
224-5704
Attorneys for Plaintiffs

Exhibit C Annexed to Affidavit of Charles P. Sifton

AFFIDAVIT

THE STATE OF TEXAS,
COUNTY OF HARRIS, *ss.*:

BEFORE ME, the undersigned authority, on this day personally appeared J. EUGENE CLEMENTS, known to me to be the person whose name is signed hereto, who, being duly sworn, deposed and said as follows:

My name is J. Eugene Clements. I am one of the attorneys of record for the plaintiffs in the above entitled and numbered cause, and duly authorized to execute this affidavit in its behalf. The facts and matters set forth above, except where noted to be based on information and belief, are true and correct based on personal knowledge or information furnished by personnel of the plaintiffs.

SUBSCRIBED AND SWORN TO BEFORE ME on this 4th day of March, 1975, to certify which witness my hand and seal of office.

(SEAL)

/s/ DOROTHY MARSH
Notary Public in and for
Harris County, Texas

Exhibit C Annexed to Affidavit of Charles P. Sifton

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that oral depositions of William K. Greenleaf, William A. Dunlap and Gary D. Miller be taken commencing at 9:00 a.m. on Friday, March 21, 1975, at 701 Capital National Bank Bldg. in Houston, Texas, signed March 4, 1975.

/s/ ARTHUR F. LESHER, JR.
Judge Presiding

APPROVED AS TO FORM AND AS TO SUBSTANCE:

SEWELL, JUNELL & RIGGS

By /s/ J. E. CLEMENTS
J. Eugene Clements
Attorneys for Plaintiffs

Transcript of Hearing of March 12, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 C 668

[CAPTION OMITTED]

United States Courthouse
Brooklyn, New York
March 12, 1975
10:00 a.m.

Before:

HONORABLE MARK A. COSTANTINO,

U.S.D.J.

ILENE GINSBERG
Official Court Reporter

Appearances:

MESSRS. RIVKIN, LEFF & SHERMAN
Attorneys for Dow Chemical Co.

By: LEONARD RIVKIN and
BRUCE SMITH, Esqs.

MESSRS. LEBOEUF, LAMB, LIEBY & MCCRAE
Attorneys for Texas Eastern Transmission Corp. and Texas Eastern Cryogenics, Defendants

By: TAYLOR R. BRIGGS, Esq. and
CHARLES SIFTON, Esq.

Transcript of Hearing of March 12, 1975

MESSRS. MENDES & MOUNT
Attorneys for Defendant Texas Eastern Transmission Corp. and Texas Eastern Cryogenics

By: WARREN D. CHEESEMAN and
ROBINS, DAVIS & LYONS, Esqs.
Minneapolis, Minnesota

By: JAMES L. FETTERLY, Esq.

The Clerk: Civil motion, Madeline Eria v. Texas Eastern Transmission Corp., et al.

Mr. Rivkin: Does your Honor care to hear further argument?

The Court: Proceed in whatever manner you feel will expedite the matter for the Court.

Mr. Rivkin: I have further facts coming to my attention by mail and by a phone call as of yesterday which I will go into, rather than clutter the record with the same argument I made the other day.

First of all, your Honor, I received in the mail yesterday a copy of the papers that were submitted to the State Court in Texas which were the basis on which the State Court judge entered the order requiring us to commence D and I and depositions on the 21st, which is a week from tomorrow.

I will supplement the record with the papers themselves.

Mr. Briggs: I am Taylor Briggs, Mr. Sifton's partner and we have submitted those as exhibits to Mr. Sifton's affidavit of this morning.

Transcript of Hearing of March 12, 1975

Mr. Rivkin: Tetco and Texas, in support of their application to have me deposed and D and I'd, meaning my clients.

They say we have indicated an intention to delay the proceedings by attempting to remove it to the Federal Court in Texas.

I represent to this Court at this time that no such action was done or is contemplated. Since both corporations are Delaware corporations we could not get out of the State Court on those grounds.

Number two, the further statement to the State Court judge in Texas—and I might say it was all ex parte—says that—and I quote:

"Moreover, your plaintiff"—that refers to Tetco—"has reason to fear that certain crucial and vital witnesses, to wit, William K. Greenleaf of Houston, Texas, William Dunlop of Midland, Michigan and Garry B. Miller of Midland, Michigan may absent or secret themselves or may otherwise become unavailable for discovery" and so forth.

If your Honor pleases, I don't know where this idea of Dow secreting witnesses has come up.

I spoke to our attorney in Houston yesterday and he never indicated that.

I had Dow speak to the people and they never indicated they would not comply with a notice so that I submit, the order in Texas was based on a subterfuge, to say the least.

The Court: Well, I cannot rule on that.

Mr. Rivkin: I understand. I just wanted to give you the background for what I am now going to tell you and you can take it in whatever context you think is important.

Transcript of Hearing of March 12, 1975

Yesterday, my associate counsel in Texas called the judge who issued the order which is the subject of this litigation and told the judge he would like to be heard on a motion to stay or vacate his existing order requiring depositions and D and I to start on the 21st and that he would submit papers and contact his adversary, that is, Mr. Suwell's firm.

The judge indicated he could not see him and would call him when he was ready and I said to my associate, Mr. King—and I got the call 11 o'clock yesterday—"Do you mean you would get in at 4, 4:30? If so, call me tonight and I'll tell Judge Constantino."

I received a call at 6:15 at my home and the indications are that the judge probably—I don't want to be categorical on this—that the judge would not see him until sometime next week.

I represent as an attorney and officer of this Court that it appears that the State Court judge in Texas would not even hear our argument until Monday and the order is for the 21st, on Friday.

The Court: Do you have a right to bring a proceeding to attack the ex parte order?

Mr. Rivkin: Yes. I asked Mr. King down there—

The Court: Don't they have an order to show cause?

Mr. Rivkin: I asked Mr. King and he said the fastest way was to call the judge, which he did and the judge said to him—

The Court: I assume that somebody—I don't know if it is true or not—I assume that somebody said to the judge down there, "Judge Costantino in the Federal Court will try to stay your proceedings," and he probably raised his eyebrows.

Transcript of Hearing of March 12, 1975

I indicated from the bench the other day that this is one of the big problems Federal Court judges are facing with State judges.

I will state again on the record that I have no intention of usurping any State Court judge's position including any judge in Kings County. I have my own work to do and they have also.

However, they are making it a personal thing—

Mr. Rivkin: I don't know what has occurred.

The Court: I don't know either.

Mr. Rivkin: What bothers me, is that if ever a case cried out for your power of relief—and I can go into more detail and I have made more notes which I did not have present in my oral argument on Monday—it is this case and let me tell you this, your Honor. I don't know how to put it. It is not meant as a threat but rather, as a statement of fact.

Assuming your Honor feels he cannot help me, I tell you now, I cannot comply with your order for two reasons:

I have to start D and I today. I cannot leave the documents here for photostatting. I have to bring them down to Texas because they have to be looked at by the witnesses to be prepared.

In addition, Judge—and this is more important—I have to start depositions next week in this case.

You had ruled that a week after discovery is over the depositions would start.

Joe Napoli wants to get going as soon as possible. He is plaintiff's counsel, for the record.

I need those very papers they are looking at now to cross-examine Tetco's witnesses on the depositions starting

within a week. How, that same week, can I bring them to Texas without flouting your order?

I stand back now because I think everything else has been urged before.

Mr. Briggs: Taylor Briggs of the LeBoeuf firm, counsel in the Texas proceeding and I have a little more to add with respect to the proceeding down there in addition to what Mr. Rivkin has told you although I think his argument points out that in terms of scheduling Texas discovery, we are talking about a procedure which has to be resolved by the Texas court.

This is discovery conducted pursuant to a Texas order and if attacked it must be attacked down there.

With respect to the suggestion by Mr. Rivkin that he is aggrieved by the Court down there not hearing him until next Monday, I will tell you that when Dow answered down there they filed a plea in abatement which is Texas for a motion to dismiss because action is pending in another form.

They could have brought that on for a hearing on short notice under Texas procedure. They have not done so. So, it is just filing a paper without seeking a hearing.

They will have a hearing on Monday and as the cases recited in our memorandum dictate, that is where that case has to be decided.

If the law were not that way I really think the equities support the Texas Eastern position that both cases are to go on simultaneously.

We are not seeking to block either case from going forward. It is Dow asking to block the Texas case.

It is difficult to believe that the great Dow Chemical Company cannot go forward in two jurisdictions.

Let me just address myself to the two items of discovery that Mr. Rifkin talks to.

One, he says that he has got a problem of producing documents. Well, he has got his Xerox machine dial set to one in Long Island to make one copy and he can set it to two and solve his production problems here and also there.

While he scoffs at the allegation of witnesses being made unavailable I think it is odd that when Texas Eastern notices the depositions of two underling employees participating in a phone call with their employees and having made representations as to the safety of the product, it turns out these are Mr. Rivkin's trial assistants and that he cannot proceed to trial if they are being examined.

So, the Texas Eastern position is that the cases ought to go forward in both districts.

We honestly don't believe your Honor can enter any order not recognizing the dual system of courts as your Honor has and our position of being willing to cooperate and dovetail depositions so the cases may go forward both here and in Texas.

It is not a question of not enough lawyers. Dow has responsible, capable counsel in Texas and very capable counsel in Mr. Rifkin here and they have got—they don't want for lawyers. They don't want for different witnesses that are going to be examined and we cannot prejudice the advance of the Texas action for $125,000,000 until the end of all the discovery in this case appear.

So, we believe there is no need for an order and no power for your Honor to issue the order.

The Court: Don't you think they should complete the proceedings here first? This is the first jurisdiction as to

the plaintiffs in the action involving 40 deaths and the completion of which involves a person's right to have a speedy trial which would be sometime in June. Don't you think that takes a little precedence over two major corporations fighting each other and fighting over depositions regarding one jurisdiction as opposed to another? Don't you think that is a reasonable attitude, rather than saying, "We'll stand hard-nosed as to the problems of jurisdiction facing both courts"?

I like to think of a man exercising common sense in the courtroom and especially where many peoples are going to be offended and affected by the institution, actions and activities set forth in another jurisdiction.

I would think common sense would dictate that you finish one first and then see what happens in the next one.

No rights are going to be impeded or infringed upon, nor is the validity of your claim going to be destroyed.

So, I really cannot see the reason for the argument and assuming your argument is completely correct, assume that this Court has absolutely no right to say anything in Texas, assume you go down there and fight for another week as to whether or not to take depositions, is that the reasonable answer to the problem we have in this court?

Forgetting the legal semantics involved—and I don't frown upon a lawyer's using the tools of his trade because the legal semantics are tools of his trade implemented for the lawyer to be able to wield them properly so he can mold his case into what he feels is fit and proper for prosecution at the time—but that does not mean you use a saw where you are supposed to use a plane. That is the problem with this case. The perspective of this case can be abhorrent.

I ask you, why not proceed in a jurisdiction where we have already accomplished 92 percent of the major work and no effect will result as far as your other actions.

In addition, from all statements from the Texas attorney who appeared before this Court and who was an absolute gentleman and a fine lawyer, it was indicated to me that the case would not proceed to trial for at least another two years. Of course, I know nothing about the calendar practice in Texas but this case is ready for preparation for a June 1st trial. Why not do that rather than have a delay of dispositions from one jurisdiction to another?

Of course, I have been accused of using my common sense, which I enjoy. They can accuse me of using common sense from now until Doomsday but I will continue to do so. When reasonable actions are not used for the rights and benefit of man then I will use my common sense.

Mr. Briggs: May I hope to respond with common sense in a simple way.

Since our laws, as your Honor said, do not recognize a different rule for the parties—

The Court: I didn't say I didn't recognize it.

Mr. Briggs: I am not going to compare the worth of the Texas corporation cause of action and its right to proceed on that down there with the rights of the parties here.

The Court: What I said was that there would be no effect on the delay of that case because it won't be ready for two years and I am sure what you can do today and tomorrow in that case you can do a month from now without effect or offense to the case, without loss of rights or privileges, without even violating any rules of legal semantics, if you wish to call them that.

I see nothing at all that is going to affect your case in Texas by proceeding here reasonably with a stipulation of completing your proceedings before this Court and getting them out of the way so this Court can go to other business.

I do not intend to spend the rest of my life with the Dow Chemical/Texas Eastern case. Perhaps some judges would like that but I do not intend to spend my life that way.

I have nothing more to say.

Mr. Briggs: Your Honor, there is to be no delay in this prosecution, in this action, in this case because of the simple institution of depositions and discovery in the Texas court.

There is enough—there are enough persons on the Texas Eastern side and the Dow Chemical side that the cases can go forward simultaneously and expeditiously and we have said over and over again that the Texas case will not be conducted in a way which in fact creates any prejudice or delay in the case up here.

The Court: It will of necessity for this reason: that unless the depositions are completed within the time schedule this Court set forth—and each and every one of the members in the action have agreed to the time schedule the Court set forth—the case cannot be tried on June 2nd and probably would not be tried in September and probably would not be reached in November and all you are doing, whether you like it or not—and you don't wish to face the realities of the problems of the Court itself—but you are saying, "Well, we are going to do it both ways. We will divide and conquer. No problem."

Whether a division in war or court it is a division of jurisdiction.

We are talking about thousands of miles and a hundred lawyers. So, the amount of attorneys does not matter. It is a question of materials. It is like a carpenter having his tools in California and having his workbench in New York. The materials are the issue.

Mr. Briggs: We offered to take the depositions anyplace convenient to Dow Chemical.

Every indication in this court is that Dow will not even be reached for depositions until the end of April or May under this Court's schedule.

We were prepared to proceed with the depositions of these men who participated in the telephone call on March 21 so we would be in and out and through with that aspect of it.

The Court: Do you really believe that your $125 million action in Texas and your depositions would be completed by March 21st?

Mr. Briggs: Of course not. I am saying, with the manpower on both sides, these cases can proceed simultaneously as they are entitled to do under the Federal Rules and Constitution, without prejudice to this action.

Your Honor mentioned the fact of a two-year calendar schedule—

The Court: I didn't mention it. I didn't know about it until the lawyer from Texas told me.

Mr. Briggs: Well, even that schedule assumes prompt and expeditious handling by both sides in the case and Dow is seeking to delay that.

Transcript of Hearing of March 12, 1975

The Court: I didn't get that reaction from the statement. That is not the reaction I achieved from the attorneys' statement.

Mr. Briggs: Let me try to achieve that reaction.

There is a procedure for prompt disposition of motions down there and Dow, as I indicated did not attempt to bring on a plea in abatement hearing and Dow is just saying, "We don't want discovery until the New York trial is over."

Your Honor has contrasted the individual plaintiffs here with great corporations. It is really incredible for the Dow Chemical Company to say they cannot prepare for trial in two jurisdictions without one impeding the other.

We have gone, really, for Texas Eastern, as far as anyone can go in saying we will accommodate the schedule so that there is no prejudice here so long as there is no prejudice to the Texas case going forward.

The Court: May I say, if I had known—and hindsight is always the better—

Mr. Briggs: I heard it was 20/20 vision.

The Court: Yes. That's what I was thinking of. Foresight, they say, is industrial blindness.

If I had the hindsight when this case started I guarantee you every deposition would have been completed in this case.

But, let me say that because of the quality of the lawyers in the case it was my considered opinion having dealt with that quality of lawyers before, that all I had to do was sit down with them and ask them to proceed as expeditiously as possible and that was two years ago. It is only now, when I found out that Dow and Tetco would continue the Donnybrook no matter what happened—and it has been

happening for two years and I have been through the whole Congressional Record and the Fire Department and have had—have seen pictures regarding polyurethane and dummies running through cars—the whole gamut—and if I had known it at that time none of this would have taken place in my court. I would have done what I know best, coming from the State Court. That is, I would have said, "Expeditious procedures immediately," and that would mean everything done. But, I made the mistake—and I am willing to state that for the record—of placing confidence in the lawyers because of their quality and their reputations and the expectation that they would act expeditiously without the Court needing to meet with them every other week and having to meet with Dow and Tetco to consider who was a major and minor defendant. That wasn't necessary. I could have submitted it to a jury.

But, the hindsight, the 20/20 vision wasn't there. I was led into the field of industrial blindness but I will not be led into that field again and now, I have come into what I call legal opportunity and that means I am going to exercise the power I have as a federal judge to make sure that the case proceeds on June 2nd and regardless of turbulent waters of the seas coming through the courtroom door with a witness on the stand, this case will proceed.

Mr. Briggs: That is why Texas is trying to work out a schedule to permit both cases to proceed.

The Court: Well, do so and let me know. I will be here.

Mr. Rivkin: This record should show that Texas Eastern did not start this law suit until two years, almost to the day after the incident of 1973 and now, they are stepping

on this Court's toes whether they like it or not.

The Court: I don't need that.

Sit down and try to reach a stipulation.

Mr. Cheesman: Warren D. Cheesman and with me, your Honor, is James Fetterly of Robins, Davis & Lyons whose firm we have associated with in this case to assist in the discovery and inspection and other aspects of the case.

Your Honor, I have one more matter which relates directly to what you are saying.

In direct line with one of the comments you made, your Honor, about trying to get the discovery completed, I feel that I have to mention to you that we are out there now at the Island Inn where Dow produced their records trying to complete discovery and as we have eleven people that we have brought in from Mr. Fetterly's firm as well as some others, to conduct this work but Dow Chemical Company has set a date of the 13th, tomorrow, when they say we have to be finished with this completion of discovery and inspection and I don't think that is consistent with endeavoring to complete discovery and inspection in accordance with your Honor's schedule and we feel we are entitled to enough time to complete the discovery and protection and should not be arbitrarily cut off tomorrow evening.

The Court: What do you have to say?

Mr. Rivkin: They walked in the first day with over 100,000 documents and said "we want a copy of everything."

I did the same thing but then walked out and looked at them at my leisure and called Joe Napoli and said "Let's take the next one."

As long as they have copies, what is the difference?

The Court: Did you get copies?

Mr. Cheesman: No. I don't know how many copies—

Mr. Fetterly: That's the problem, your Honor—

Mr. Rivkin: Wait, wait. It has been three weeks and I don't have Texas' documents.

Mr. Cheesman: I was out last week with the flu. I have the documents in my office. They just have to be delivered.

The Court: Time will be extended so copies can be made.

Mr. Rivkin: We said when the discovery was over "We'll give you whatever documents are available" and I might say, at 30 at 40 per cent less than they charged us.

Mr. Cheesman: We agreed to charge them the exact same cost.

Mr. Rivkin: That's a fair statement, Warren. That's true.

I represent on this record now that we have retained a photostating man and hopefully I will have them within a week or ten days but before three weeks.

Now, what is the procedure for when we report back? I have to cut discovery off if I don't get ruling or work something out with Mr. Briggs.

The Court: I am sure you will work it out today.

Mr. Rivkin: If not, we can come back to Chambers and alert someone here?

The Court: Surely.

(Recess taken.)

(After recess.)

(Whereupon present in the courtroom were Mr. Leonard Rivkin, Mr. Bruce Smith, Mr. Taylor R. Briggs, and Mr. James Fetterly.)

Transcript of Hearing of March 12, 1975

Mr. Rivkin: If your Honor please, with the suggestions and aid of the court, Mr. Briggs, his associates and myself and my associates have worked for the past two hours and I think we have a stipulation which will effectuate the disposition of the proceeding presently before you and I'd like to turn the podium over to Mr. Briggs to read the proposed stipulation. It is only a proposed stipulation.

Mr. Briggs: I am going to do this as a reader because this is a result of our joint efforts and proferred because other ideas were reasonable to ourselves but not to the others.

This is the proposed stipulation:

If at the end of the Dow depositions in spring, it appears that the trial will go forward in June as it is now scheduled, discovery in the Texas action will await the end of that trial.

To cover all contingencies if for any reason at the end of the depositions of the Dow witness this spring, it should appear that this trial will not go forward in June Dow will make its witnesses available in New York for depositions in the Texas case immediately following their examinations by the parties in this case.

The Court: All right.

Mr. Rivkin: No, may I say that it is the intent of the parties, if I understand it correctly, that Mr. Briggs and his office will take any and all steps necessary to effectuate the intent of this stipulation in the Texas court and they will direct their Texas attorney so to do, referring specifically but not excluding others—referring to the Texas order for discovery down in Texas—and further, I represent for the record and I hope Mr. Briggs will, that I bind the attorneys in the Texas action.

Mr. Briggs: Well, I think we will each instruct our parties with respect to it and since it is your motion pending down there, I gather both your lawyers and our lawyers will settle it with the Texas judge.

Mr. Rivkin: No. But I want you to state that you have the authority to enter the stipulation as to the case here and in Texas too.

Mr. Briggs: I'm attorney of record there as well.

Mr. Rivkin: I am sorry, Taylor, I forgot that.

It is hereby stipulated and agreed by and between the attorneys for Dow and Texas Eastern, the following—

Mr. Briggs: If at the end of the depositions of Dow witnesses this spring, it appears that this trial will go forward in June as now scheduled, discovery in the Texas action will await the end of this trial.

If for any reason at the end of the depositions of Dow witnesses this spring, it ould appear that trial will not go forward in June Dow will make its witnesses available in New York for depositions in the Texas case immediately following examinations of those witnesses by the parties in this case.

Mr. Rivkin: It is further understood and agreed that an order may be entered on this stipulation without further notice to the parties.

It is understood between counsel for Tetco and counsel for Dow that this stipulation applies only to discovery re proceedings in the Texas Court and does not bar any or all other proceedings that either party cares to move on.

The Court: In this court.

Mr. Rivkin: In this court or the Texas court.

The Court: Submit an order if you wish one signed.

Mr. Rivkin: Let it be understood for this record that I am not intending to waive or withdraw or discontinue the pressing of my 2283 motion which was made a week ago to enjoin the entire case in Texas.

The Court: That will be held in abeyance at this time.

Mr. Rivkin: And for which we have times for briefing and so forth.

The Court: Yes.

Mr. Rivkin: The stipulation applies only to discovery.

It is further understood that the order to show cause for a restraining order under RCP6. previously submitted to the Court and served upon Tetco by Dow is herein and hereby withdrawn and this stipulation and agreement by and between the parties supersedes and is to take the place of any requests previously made in the foregoing motions or order to show cause.

For the record, I thank the Court and I think without the aid of the Court we could not have done this.

Order of Hon. Mark A. Costantino Dated March 14, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Upon reading and filing the stipulation of counsel entered into before this Court on March 12, 1975, a copy of which stipulation is annexed hereto, and Leonard L. Rivkin, Esq., having appeared on behalf of The Dow Chemical Company and Taylor R. Briggs, Esq., and James L. Fetterly, Esq., having appeared on behalf of Texas Eastern Transmission Corp. and Texas Eastern Cryogenics Inc., and the Court having been advised that there is presently pending an action between the aforesaid parties in the Harris County Court, State of Texas, and the Court taking notice of the fact that depositions and discovery of The Dow Chemical Company are presently scheduled in the instant case, it is hereby

ORDERED, that if at the end of the depositions of The Dow Chemical Company's witnesses, this spring, it appears that this trial will go forward in June, as now scheduled, discovery in the Texas action will await the end of this trial, and it is further

ORDERED, that if, for any reason, at the end of the depositions of The Dow Chemical Company's witnesses, this spring, it should appear that this trial will not go forward

Order of Hon. Mark A. Costantino Dated March 14, 1975

in June, The Dow Chemical Company will make its witnesses available in New York for depositions in the Texas action immediately following the examinations by parties in this case.

Dated: March 14, 1975.

MARK A. COSTANTINO
Judge of the United States
Federal Court for the Eastern
District of New York

PAGES OF TRANSCRIPT APPENDED TO ORDER DATED MARCH 14, 1975

Mr. Rivkin: If your Honor please, with the suggestions and aid of the court, Mr. Briggs, his associates and myself and my associates have worked for the past two hours and I think we have a stipulation which will effectuate the disposition of the proceeding presently before you and I'd like to turn the podium over to Mr. Briggs to read the proposed stipulation. It is only a proposed stipulation.

Mr. Briggs: I am going to do this as a reader because this is a result of our joint efforts and proferred because our ideas are reasonable to ourselves but not the others.

This is the proposed stipulation:

If at the end of the Dow depositions in spring, it appears that the trial will go forward in June as it is now scheduled, discovery in the Texas action will await the end of that trial.

To cover all contingencies if for any reason at the end of the depositions of the Dow witness this spring, it should appear that this trial will not go forward in June Dow will make its witness available in New York for depositions in the Texas case immediately following their examination by the parties in this case.

The Court: All right.

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resent for the record and I hope Mr. Briggs will, that I bind the attorneys in the Texas action.

Mr. Briggs: Well, I think we will each instruct our parties with respect to it and since it is your motion pending down there, I gather both your lawyers and our lawyers will settle it with the Texas judge.

Mr. Rivkin: No. But I want you to state that you have the authority to enter the stipulation as to the case here and in Texas too.

Mr. Briggs: I'm attorney of record there as well.

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Mr. Rivkin: It is further understood and agreed that an order may be entered on this stipulation without further notice to the parties.

It is understood between counsel for Tetco and counsel for Dow that this stipulation applies only to discovery re proceedings in the Texas Court and does not bar any or all other proceedings that either party cares to move on.

Pages of Transcript Appended to March 14 Order

The Court: In this court.

Mr. Rivkin: In this court or the Texas court.

The Court: Submit an order if you wish one signed.

Mr. Rivkin: Let it be understood for this record that I am not intending to waive or withdraw or discontinue the pressing of my 2283 motion which was made a week ago to enjoin the entire case in Texas.

The Court: That will be held in abeyance at this time.

Mr. Rivkin: And for which we have times for briefing and so forth.

The Court: Yes.

Mr. Rivkin: The stipulation applies only to discovery.

It is further understood that the order to show cause for a restraining order under RCP65 previously submitted to the Court and served upon Tetco by Dow is herein and hereby withdrawn and this stipulation and agreement by and between the parties supersedes and is to take the place of any requests previously made in the foregoing motions or order to show cause.

For the record, I thank the Court and I think without the aid of the Court we could not have done this.

Memorandum Decision of Hon. Mark A. Costantino Dated March 21, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

COSTANTINO, D.J.

This motion by one defendant in this action, Dow Chemical Company, requests the court to enjoin two other defendants, Texas Eastern Transmission Corporation and Texas Eastern Cryogenics Inc., from proceeding in a lawsuit instituted in Harris County District Court, Texas by the Texas Eastern defendants against Dow. Both suits are founded upon the tragic fire and explosion at a Staten Island, New York liquid natural gas tank in which forty men were killed.

Title 28, United States Code, section 2283, the "anti-injunction" statute, clearly indicates that federal courts should refrain from enjoining state court proceedings unless special circumstances are shown. On March 12, 1975 the parties to this motion stipulated that discovery in the Texas action would await the completion of the trial now scheduled for June 2, 1975 in the New York federal action. That stipulation was "so ordered" on March 14, 1975. Because of that stipulation, consideration of the 2283 motion will be held in abeyance until after the trial of the federal

Memorandum Decision of Hon. Mark A. Costantino
Dated March 21, 1975

action or until such time as any conflict or difficulty with regard to simultaneous proceedings in both actions are brought to the court's attention.

/s/ Mark A. Costantino
U.S.D.J.

Letter of LeBoeuf, Lamb, Leiby & MacRae
Dated March 31, 1975

(Letterhead of LeBoeuf, Lamb, Leiby & MacRae,
New York, New York 10005)

March 31, 1975

Honorable Mark A. Constantino
United States District Court Judge
United States District Court
for the Eastern District of
New York
225 Cadman Plaza East
Brooklyn, New York

Re: Eria v. Texas Eastern
Transmission Corporation, et al.
73 Civ. 668

Dear Judge Constantino:

I am writing this letter on behalf of this firm and on behalf of the other firms of attorneys representing the interests of Texas Eastern Transmission Corporation in the property damage action instituted by Texas Eastern in the Harris County District Court in Texas. We are concerned with the language in Your Honor's Memorandum Decision filed in this action March 21, 1975 which came to our attention last week and which appears to describe the stipulation entered into between Texas Eastern and The Dow Chemical Company of March 14, 1975.

The language from Your Honor's Memorandum Decision with which we are concerned states that Dow and Texas Eastern "stipulated that discovery in the Texas action would await the completion of the trial now sched-

uled for June 2, 1975 in the New York federal action." Our agreement with Dow, as set forth in the transcript annexed to Your Honor's Order, is that discovery in the Texas action will await the end of the trial now set to commence in June, 1975 in the event that that trial goes forward as presently scheduled on June 2nd. However, in the event the trial does not commence as scheduled, then discovery in the State action will go forward.

If there is any misunderstanding as to what Texas Eastern has agreed to, or in the event that Your Honor believes that Texas Eastern has deferred discovery in the Texas action until after the trial of the personal injury actions, whenever it commences, then we suggest that Your Honor proceed immediately to consideration of the two Dow motions—both the motion seeking to stay the Texas action, and the motion seeking to stay discovery in the Texas action.

One other matter in Your Honor's Memorandum Decision of March 21, 1975 requires comment. Texas Eastern has, since February 10, 1973, disputed references to the Staten Island fire as an "explosion". It remains a disputed fact in this proceeding.

I am, of course, sending a copy of this letter to counsel for The Dow Chemical Company.

Respectfully yours,

/s/ Taylor R. Briggs

TRB/cw

cc: Leonard L. Rivkin, Esq.

Letter of Rivkin, Leff & Sherman Dated July 16, 1975

(Letterhead of Rivkin, Leff & Sherman,
Freeport, New York 11520)

July 16, 1975

Chambers of Honorable Mark A. Costantino
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Eria v. TETCO, et al
73 C 668

Dear Judge Costantino:

Pursuant to your "Memorandum Decision" of 3/21/75, I wish to advise that there now appears to be a "conflict" with regards to simultaneous proceedings involving the Eria action pending in your Court and the action pending in the Houston State Court action in Texas wherein TETCO is a plaintiff against Dow and Battelle Memorial Institute.

Dow's counsel in the Houston State Court action have advised me today that they received a notice to take oral deposition of Dow employees from the TETCO attorneys in the aforementioned state court action. Upon receipt of the foregoing advice, I immediately contacted Mr. Sifton of LeBoeuf, Lamb, Leiby & MacRae in an effort to clarify my understanding that the stipulation upon which your Order of 3/21/75 was based would "stay" the Texas

Letter Dated July 16, 1975

State Court depositions until the New York depositions were completed. Mr. Sifton advised, in substance, that he disagreed with my interpretation of the stipulation and that same did not prohibit simultaneous depositions.

As counsel for Dow Chemical, I represent to this Court that it is not only difficult to conduct simultaneous depositions in Houston and New York; but is factually a conflict, and in fact, is next to impossible to accomplish.

Pursuant to the suggestion of your Law Secretary, Mr. Gould, I am advising all parties, through their attorneys, of a conference before Your Honor on Wednesday, July 23, 1975 at 10:00 A.M. to clarify this entire matter. We are not proceeding by way of Order to Show Cause due to the suggestion of Mr. Gould and respectfully request you to note that all parties are being notified of this conference by a copy of this letter.

Very truly yours,

RIVKIN, LEFF & SHERMAN

By: /s/ L. L. RIVKIN

LLR:ib

cc: Mendes & Mount, Esqs.
27 William Street
New York, New York 10005

Attention: Warren Cheeseman, Esq.

Letter Dated July 16, 1975

Le Boeuf, Lamb, Leiby & MacRae, Esqs.
140 Broadway
New York, New York 10005

Attention: Anthony Sifton, Esq.

Sewell, Junell & Riggs, Esqs.
701 Capital National Bank Building
Houston, Texas 77002

Attention: Ben G. Sewell, Esq.

Clausen, Miller, Gorman, Caffrey
& Witrous, Esqs.
135 South LaSalle Street
Chicago, Illinois 60603

Bracewell & Patterson, Esqs.
First City National Bank Building
Houston, Texas 77002

Attention: Charles King, Esq.
William Wilde, Esq.

Bigham, Englar, Jones & Houston, Esqs.
99 John Street
New York, New York 10038

Attention: John Quinlan, Esq.

Fulbright & Jaworski, Esqs.
Bank of the Southwest Building
Houston, Texas 77002

Attention: Kraft Eidman, Esq.

Letter of LeBoeuf, Lamb, Leiby & MacRae
Dated July 21, 1975

(Letterhead of LeBoeuf, Lamb, Leiby & MacRae,
New York, N. Y. 10005)

July 21, 1975

By Hand

The Honorable Mark A. Costantino
United States District Court Judge
for the Eastern District
of New York
225 Cadman Plaza East
Brooklyn, New York

Re: Eria v. Texas Eastern, et ano.
73 Civ. 668

Dear Judge Costantino:

I am in receipt of a copy of a letter to Your Honor from the law firm of Rivkin, Leff & Sherman, counsel for The Dow Chemical Company in the above-captioned proceeding, advising me of a conference to be held this Wednesday at 10:00 A.M. Because that letter sets forth the position of Dow with respect to the matters to be discussed at that conference, and because it omits mention of the denial of a prior application to the State Court in Texas for the same relief it now seeks from Your Honor, I am submitting this letter prior to the conference.

Shortly following Your Honor's Memorandum Decision of March 21, 1975 setting forth the decision to hold in

abeyance any decision on Dow's motion, pursuant to Title 28, U.S.C. §2283, to enjoin the State Court proceeding, Dow brought on for trial before the State Court in Texas an application to abate proceedings in the Texas action because of the pending proceeding here in New York. On May 19, 1975, a hearing was held on that application before the Honorable Arthur F. Lesher, Jr., Presiding Judge in the Texas proceeding, at which evidence was taken with respect to the pendency of the two actions and the alleged harassment and inconvenience to Dow resulting therefrom. Following argument by the parties and the exchange of post-hearing briefs on all of the same legal issues which have been briefed by Dow in this proceeding, Judge Lesher denied Dow's request to abate the Texas proceeding. Having fully litigated the identical issues in the Texas forum and lost, Dow is in no position to relitigate them before Your Honor.

In its letter of July 16, 1975, counsel for Dow makes no mention of the denial of its plea in abatement in Texas. It does argue, however, that the stipulation entered into between Texas Eastern and Dow on March 14, 1975 "would 'stay' the Texas State Court depositions until the New York depositions were completed." As Your Honor is aware, no such stipulation was ever entered into by Texas Eastern. If it had been, there would have been no need for Dow to bring on its plea in abatement for trial in Texas in May. The stipulation entered into with the assistance of this Court in March was entered into because the parties then contemplated a trial to commence June 2, 1975, with depositions of all parties to have been completed

prior to that date. As it has turned out, not only did the trial not go forward in June, the depositions of The Dow Chemical Company have even now not commenced. Since the conditions which gave rise to the stipulation and to which it was addressed, namely, a June trial and depositions of Dow to be held in the Spring, have not occurred, the stipulation has no bearing whatsoever on the present efforts to commence discovery in Texas.

Finally, I must comment on the statement in the July 16, 1975 letter of counsel for Dow that it will be "next to impossible" for Dow to be deposed at any time prior to the completion of the depositions in the New York case. Such a claim from a corporation of Dow's size and resources is ludicrous. As an examination of plaintiffs' Notice to Take Oral Deposition, a copy of which is enclosed herewith, will show, Texas Eastern is engaged in Texas in the most preliminary and basic discovery seeking disclosure of organizational charts, heads of various departments, names and functions of the various Dow departments and divisions, lines of communication and filing practices. The most junior attorney of Dow's house counsel's staff should be in a position to represent the corporation in Texas on this matter. Instead, it is represented by two partners of an eminent Houston firm of attorneys, Bracewell & Patterson, who represented Dow as well in connection with its plea in abatement. Dow is perfectly capable of defending the Texas action at the same time as the numerous other actions filed against it throughout the country with respect to the burning characteristics of its urethane insulating material.

Letter Dated July 21, 1975

For these reasons, as well as the legal considerations set forth in earlier memoranda filed by Texas Eastern with respect to Dow's application to enjoin the State Court proceeding, Dow's application to enjoin the State Court proceeding on the authority of Title 28 U.S.C. §2283 should be in all respects denied.

Yours truly,

LeBoeuf, Lamb, Leiby & MacRae

By /s/ Charles P. Sifton
Charles P. Sifton

CPS/cw
Enc.

cc: Rivkin, Leff & Sherman
55 North Ocean Avenue
P.O. Box 669
Freeport, New York 11520

Attention: Leonard A. Rivkin, Esq.

Bracewell & Patterson
First City National Bank Building
Houston, Texas 77002

Attention: Charles King, Esq.
William Wilde, Esq.

Bigham, Englar, Jones & Houston
99 John Street
New York, New York 10038

Attention: John Quinlan, Esq.

Letter Dated July 21, 1975

Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Attention: Kraft Eidman, Esq.

Sewell, Junell & Riggs
701 Capital National Bank Building
Houston, Texas 77002

Attention: Ben G. Sewell, Esq.

Clausen, Miller, Gorman,
Caffrey & Witous
135 South LaSalle Street
Chicago, Illinois 60603

Attention: John J. Witous, Esq.

Mendes & Mount
27 William Street
New York, New York 10005

Attention: Warren Cheesman, Esq.

[The July 16, 1975 letter of Rivkin, Leff & Sherman originally attached to the July 21, 1975 letter of LeBoeuf, Lamb, Leiby & MacRae is reprinted at page 103a of this Appendix.]

Letter Attached to July 21, 1975 Letter of LeBoeuf, Lamb, Leiby & MacRae

(Letterhead of Sewell, Junell & Riggs,
Houston, Texas 77002)

July 14, 1975

88630/001
Texas Eastern Transmission
Corporation, et al. vs. Dow
Chemical Company, et al.
No. 1,013,628 in the 157th
District Court of Harris
County, Texas

Hon. Ray Hardy, District Clerk
Harris County Civil Courts Bldg.
Houston, Texas 77002

Dear Mr. Hardy:

Enclosed is Plaintiffs' Notice to Take Oral Deposition for filing in the above entitled and numbered cause. Please indicate the date of receipt and filing on the margin of this letter and return same to us for our file.

By copy of this letter, we are forwarding a copy of these Interrogatories to counsel for Dow Chemical Company, Messrs. William Key Wilde and Charles G. King of the firm of Bracewell & Patterson, First City National Bank Building, Houston, Texas 77002, and to counsel for Battelle Memorial Institute, Mr. Kraft Eidman of the firm of Fulbright & Jaworski, Bank of the Southwest Build-

Letter Attached to July 21, 1975 Letter of LeBoeuf, Lamb, Leiby & MacRae

ing, Houston, Texas 77002, by certified mail, return receipt requested.

Thank you for your customary courtesy.

Yours very truly,

SEWELL, JUNELL & RIGGS

By .....
Ben G. Sewell

BGS:dm
Enclosure

cc: Messrs. William Key Wilde and
Charles G. King, w/encl.—
C.M.,R.R.R.

Mr. Kraft Eidman, w/encl.—
C.M.,R.R.R.

Mr. Roger Rehorn, w/encl.
A-1 Reporting Service, Inc.
620 C & I Building
Houston, Texas 77002

Plaintiffs' Notice to Take Oral Depositions Attached to Letter of LeBoeuf, Lamb, Leiby & MacRae Dated July 21, 1975

IN THE

DISTRICT COURT OF HARRIS COUNTY, TEXAS

157TH JUDICIAL DISTRICT

No. 1,013,628

TEXAS EASTERN TRANSMISSION CORPORATION, *et al.*,

—v.—

DOW CHEMICAL COMPANY, *et al.*

COME NOW Texas Eastern Transmission Company and Texas Cryogenics, Inc., plaintiffs in the above entitled and numbered cause, pursuant to Rule 200 of the Texas Rules of Civil Procedure, and hereby serve notice of their intention to take the deposition of the witness or witnesses to be designated by defendant, Dow Chemical Company, who are most familiar with the organizational structure of Dow Chemical Company for the years 1963 through 1973, whose knowledge consists of, but is not limited to, the following information as it relates to polymeric insulation material, including, but not limited to, polyurethane foam insulation:

a) The organizational charts, including staffing, of Dow Chemical Company.

b) The heads of various departments, divisions, branches and/or other identifiable groupings within the Dow Chemical Company.

c) The members or employees assigned to each such department, division, branch or other groupings.

d) The names and functions of the various departments, divisions, branches or groupings.

e) The line of communication between the various departments, divisions, branches and/or groupings and the means by which information and communications were transmitted by and between the various departments, divisions, branches and/or groupings, including the names and addresses of the persons involved therein.

f) The method by which each department, division, branch and/or grouping stored, retrieved and dissimulated information within its own department, division, branch and/or grouping and with other departments, divisions, branches and/or groupings.

The aforesaid deposition or depositions will commence at 10:00 a.m. on Thursday, August 14, 1975, at the offices of Sewell, Junell & Riggs, 701 Capital National Bank Building, Houston, Harris County, Texas.

Pursuant further to Rules 200 and 201 of the Texas Rules of Civil Procedure, plaintiffs will require the witness or witnesses to bring with them all books, papers, documents and tangible things subject to the custody of the defendant necessary in order to identify and give the present location

of all fact witnesses having knowledge of the above and foregoing matters and the location of all documents relating thereto and the name and address of the present custodian of such documents.

Respectfully submitted,

SEWELL, JUNELL & RIGGS

By .....
Ben G. Sewell and
J. Eugene Clements
701 Capital National Bank Bldg.
Houston, Texas 77002
224-5704

LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

CLAUSEN, MILLER, GORMAN, CAFFREY
& WITOUS
135 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Plaintiffs

[Certificate of Service omitted in printing.]

Transcript of Hearing of July 23, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

United States Courthouse
Brooklyn, New York
July 23, 1975

Before:

HONORABLE MARK A. COSTANTINO,

U.S.D.J.

Appearances:

MESSRS. RIVKIN, LEFF & SHERMAN
Attorneys for Defendant
The Dow Chemical Company

By: LEONARD L. RIVKIN, Esq.
Of Counsel

MESSRS. MENDES & MOUNT
Attorneys for Defendants
Texas Eastern Transmission Corp. and
Texas Eastern Cryogenics, Inc.

By: WALTER DONNELY, Esq.
Of Counsel

Transcript of Hearing of July 25, 1975

MESSRS. LE BOEUF, LAMB, LEIBY & MACRAE
Attorneys for Defendants
Texas Eastern Transmission Corp. and
Texas Eastern Cryogenics, Inc.

By: CHARLES GIFTON, Esq.
Of Counsel

MESSRS. SEWELL, JUNELL & RIGGS
Attorneys for Defendants
Texas Eastern Transmission Corp. and
Texas Eastern Cryogenics, Inc.

By: BEN SEWELL, Esq.
Of Counsel

MESSRS. CLAUSEN, MILLER, GORMAN, CAFFREY & WITOUS
Attorneys for Defendants
Texas Eastern Transmission Corp. and
Texas Eastern Cryogenics, Inc.

By: JACK WITOUS, Esq.
Of Counsel

Mr. Rivkin: My name is Leonard Rivkin from Rivkin, Leff & Sherman, Freeport, New York, attorneys for Dow Chemical.

If your Honor please, this is an application made for an order of this Court which would effectively cause Texas Eastern to cease and desist in their attempt to harass Dow

in other jurisdictions by attempting to have Dow proceed with witnesses on depositions and the production of documents for discovery at a time when the very same witnesses and the very same documents are required in a case involving forty deaths presently pending before your Honor.

As your Honor well knows, by the history of this proceeding, there is a property damage subrogation case pending in the state court in Houston, where Texas Eastern is suing Dow.

I might say, sir, just recently Battelle was added by Eastern in that Houston state court action. That's why I noticed Mr. Quinlan of my notice to your Honor.

This action—this subrogation case in Houston, was brought approximately two years after the death actions were commenced and one day less than two years after the cause of the incident.

Under cover of July 14th, the TETCO attorneys, the subrogation attorneys, in Houston, served the Dow attorneys, and I believe the Battelle attorneys, with a notice of oral deposition for the Dow witnesses. Also to produce documents in support of the testimony of the witnesses. All returnable on August 14th in Houston, Texas. Our depositions are to continue before the Special Master, who was ordered to be—that is, a Special Master in this case on August 4, ten days before. I cannot, and I make the representation, comply with both orders.

The Court: August 14, you say?

Mr. Rivkin: I have a copy of the Houston papers that were served upon Dow by the Houston attorneys for

TETCO, requiring the oral depositions and the papers to be produced August 14, and the Master is going to start again with us in New York August 4.

The Court: I have it here.

Mr. Rivkin: I'm sorry. I didn't know you did.

I cannot comply. Now, by way of history on this very subject, you will very well recall, your Honor, we had a discussion of this before. In March of this year, TETCO and the Dow attorneys worked out a stipulation, which I believe covered this situation.

Basically, if there was a trial in June of '75, the Houston discovery would await the completion and also, if there was no trial in June, the Texas attorneys would come to New York and depose the Dow witnesses following their depositions in the forty death cases. In the Eria action, that was my understanding of the intent of the stipulation. An order was entered on that stipulation, sir.

Do you want me to pass these up? I have the orders.

The Court: Please.

Mr. Rivkin: Sure. I think it's the second page, sir.

The Court: All right, go ahead.

Mr. Rivkin: Now, when I received from my Houston lawyers the copies of the papers, I immediately called the TETCO attorneys in New York, who are the attorneys of record in Houston, also. They advised me that their understanding of the stipulation for a number of reasons, which I don't agree with, but I'll let them discuss their own arguments, did not apply any more since the deposition of Dow witnesses did not proceed in the spring of '75. I submit that the full and complete stipulation and the intent of

the stipulation is still effective and should bar any discovery proceedings in Houston and the intent of the stipulation was that if the Dow trial did not go on in June in New York that the Dow witnesses would be deposed in New York by their Houston lawyers following their New York depositions.

I will be pleased to abide by that stipulation. I would therefore, ask the Court to enforce the stipulation and the intent of the stipulation by order.

One, I would ask this Court to enter an order which would enforce the intent of the stipulation which was made an order of this Court in March of '75 or stop the subrogation discovery by entering an order based on your memorandum decision of March 21, 1975, and I respectfully call your Honor's attention to the last part of it.

The Court: All right, go ahead.

Mr. Rivkin: Now, I submit the Court could stop this harassment any one of two ways; the very same facts, I'm sorry, I didn't know you were reading it.

The Court: Go ahead, I'm listening.

Mr. Rivkin: The very same facts which gave rise to the stipulation, the order and the decision there are still pertinent in fact, more so, because it looks like we might hit an October trial now. I'm within three months of trial. There have been no change in facts. In fact, the pressure is on me even more in New York. My clients, my witnesses and my documents keeping in mind, I think we produced 10,000 of them already. The Houston action, based on what Mr. Sewell had indicated a prior argument, still has two, two and a half years to go before it can be reached for court. I cannot comply with both orders.

Now, the gentleman who entered into the stipulation with me, who would be best to either argue or consent, Taylor Briggs, isn't even here.

The Court: Where is he?

Mr. Sifton: Your Honor, he's on vacation. He's in Canada and I'm here from his office. I was here.

The Court: You were here?

Mr. Sifton: Yes, I was. My name is Charles Sifton. Just to correct the record, I am not counsel of record in this case. Neither is Mr. Rivkin counsel of record in the Texas case.

Mr. Rivkin: I said I called—

The Court: Mr. Briggs?

Mr. Sifton: Counsel of record in the Eria case is Mr. Donnely, who was appointed by the insurers, with the firm of Mendes and Mount.

Mr. Rivkin: I thought I said I spoke to one of the attorneys in New York who is counsel of record in the Houston case.

Mr. Sifton: I may have misunderstood.

Mr. Rivkin: These things happen. What is more important than the written word is why was it done? The intent, and I noticed—

The Court: Why?

Mr. Rivkin: Last night at 9:00 o'clock while I couldn't get my mind off what I was going to say this morning, I reviewed the stipulation of and the transcript of March 12, '75, and I find out that the stipulation left out two or three word preamble. I will read it then and hand it in to your Honor. I refer to page 22 and I quote Mr. Briggs: "to cover all contingencies" and then, line 21, if your Honor would look at the stipulation before him.

The Court: Yes.

Mr. Rivkin: It starts out at the end of the —"if, for any reason" it starts out, but one of the paragraphs commences near the end.

The Court: All right.

Mr. Rivkin: The one you have, in the order on—"for any reason," do you see that there, your Honor?

The Court: I see it.

Mr. Rivkin: "If, for any reason, the end of the depositions the Dow witnesses"—

The Court: Yes.

Mr. Rivkin: The transcript on page 22 of March 12 starts out by saying, "to cover all contingencies if for any reason."

I'd like to pass it up to your Honor. Then, it reads verbatim from the stipulation.

I submit to you that "to cover all contingencies" means just what it says. Therefore, I should be entitled to the enforcement of the intent of the stipulation.

The Court: This was a transcription of this paragraph, Mr. Rivkin.

Mr. Rivkin: Yes, sir. What happened was, we put on the record our understanding and then, I believe it was Mr. Flamsom or my office entered an order, but I see those words were left out.

Now, they are asking, therefore, I would therefore ask the Court to enter an order against—I just repeat, for the sake of clearing up one; that an order be entered enforcing the terms of the stipulation holding the other terms in abeyance. That your Honor take over based on the decision on the 2283 motion, in which your Honor said if there is interference. . .

Now, I believe, No. 1; I just want to make two, three points and I'm through. I believe, No. 1, your Honor has absolute jurisdiction on this because there was a stipulation entered into this Court with consent of all parties, which was made an order. So, there is subject matter jurisdiction over it and No. 2; I have received by telephone call this morning information on a letter which LeBoeuf, Lamb, mailed to me, Monday. It was in my office this morning and I didn't get it.

I would like to bring up two points: We have previously made a plea of abatement in the Texas court, which was denied. That had nothing to do with discovery that was to stop the whole case. That was denied. Our prior proceedings here were two in number; one when in 2283, which was the injunction to stop the whole thing and then, as a result of my request for a temporary restraining order, this stipulation was entered into.

So, I would submit to your Honor that if they have—

The Court: That was because I didn't want to impose upon the jurisdiction of the Texas court.

Mr. Rivkin: Right. I didn't ask in my restraining order to stop the whole case down there. Just hold back discovery until I finished in New York. As a result of that, the stipulation was entered into and by consent an order was signed. So, you have jurisdiction on the subject of deposition. I still will agree to give them my witnesses in New York the day they're through and leave them here for another week if they want to be deposed by the Houston lawyers. What we had discussed, sir, was when the New York lawyer finished with my witnesses, they might not even need any more. I would therefore, respectfully re-

quest the Court to either enter an order enforcing the stipulation agreement and intent therefore or enter an order based upon our 2283 motion, to the effect there appears to be a conflict and the Texas discovery will await completion of discovery.

I might say this: The New York discovery should be through in a few months and they have a two-year wait. I don't have any notes to go over.

Thank you for your time.

The Court: All right.

Mr. Sifton: Your Honor, this whole case was litigated in Texas in May of this year after your Honor came down with the decision in which you said, you would hold in abeyance the decision on Mr. Rivkin's motion pursuant to 2283, to stay the proceeding here. Mr. Rivkin went to Texas before Judge Lesher and he put on evidence, put people on the stand and was cross-examined. Mr. Rivkin took the stand and testified to the harassment he said he would undergo from conducting two lawsuits. He is no—incidentally, may I emphasize that there is another counsel when he says he cannot comply with two orders. He's not being asked to. There is Dow Chemical and there are Houston attorneys who can comply with that order.

We have a very limited request for discovery which is before your Honor and that's why I submitted it by letter to you. We want to get started. We have been stonewalled in the case in Texas in getting ahead with commencing discovery down there. We want to depose specific individuals on a specific date in August. It is a limited subject which is—the very beginning of discovery in a very

large case down there involving issues that are not even before this Court.

If this discovery on the Texas case of Dow gets intertwined with discovery up here on the eve of trial, it is inevitable it is going to delay the proceeding up here. Dow Chemical is a company of great resources and with many attorneys.

The Court: All companies have great resources.

Mr. Sifton: It can, very easily can meet this discovery down there. If they have some problem with the man whom they're asking to produce in Texas, if they want, if they want some time because of conflict with it—

The Court: Did this stipulation go before the court in Texas?

Mr. Sifton: It could perfectly well have been introduced down there. I can't—

The Court: Was it before the Court?

Mr. Sifton: I can't see how Mr. Rivkin can say the stipulation covers this situation months after June. They didn't introduce it down there before the court because if he had the stipulation, which he says today he has, he wouldn't have had to make a motion in Texas. He knows very well he went down to Texas to obtain the same relief.

The Court: How do you read the stipulation?

Mr. Sifton: Your Honor, the stipulation was entered into because at that time we contemplated a trial in June.

The Court: Right.

Mr. Sifton: We contemplated discovery going forward in June. Under those circumstances to cover that very limited problem of a June trial, we said that if the case goes forward in June, if witnesses are called in the spring

from Dow, and if a June trial will not go ahead, we will in the spring depose the Dow people up here. We're way past the spring and we still have not had discovery in the Texas action, not had discovery up here. We want to get started down in Texas.

The Court: Is it limited to June? It covers all contingencies. If for any reason at the end of the deposition, do you want witnesses this spring here? If this trial will not go forward in June—

Mr. Sifton: That covers—

The Court: Dow makes witnesses available in New York for depositions in the Texas case.

Mr. Sifton: That covers the two contingencies of a trial, the trial going forward in June or not.

The Court: But it didn't go forward in June. Said "be deposed in New York."

Mr. Sifton: Nor, your Honor, were there depositions in the spring. So this stipulation—in all honesty, your Honor, we would not foreclose ourselves for all times and put ourselves behind in a personal injury case. That was a limited situation which we contemplated in June, in which we tried to assist this Court in trying to get forward with a June trial. But we didn't foreclose ourselves for all time and put ourselves eternally behind the progress of the personal injury case.

The Court: I'm just trying to find out what you're saying. Are you saying the depositions should then have been taken prior to June in New York?

Mr. Sifton: Your Honor, what we contemplated—

The Court: I was here. I know what you are talking about. It wasn't a question of contemplation, I heard everybody say it. My understanding was, you weren't going to

do a thing in Texas until we were at least able to have all the depositions taken in New York and that's what I understood.

I know of no double-talk at the time even though the language is simple.

Mr. Sifton: The situation which we had before us contemplated there would be Dow witnesses being deposed during the month of May, April and May. We were in March then and the agreement was that if their witnesses were called in April or May, we would not depose them if the June trial date was still on. But if the June trial date had been deferred, we were in April or May—

The Court: You knew in May the June trial date was going to be deferred.

Mr. Sifton: I beg your pardon, your Honor?

The Court: Of course, you knew I had to appoint a Special Master.

Mr. Sifton: We applied during the month of May, your Honor, for deferral of the trial but we did not have, we did not—

The Court: None of the problems, none of the problems that have arisen at this point were caused by any one defendant. They were caused by the multi situation of the case itself, the multi-defendant situation. In the depositions that were to be taken before Judge Catoggio, I finally appointed Judge McNally and we still really haven't raised any point, any one can see anything that has been completed. I don't understand how you are going to arrive at your conclusion.

Mr. Sifton: Perfectly right, your Honor. We want to go ahead now independently of this trial without imposing on you before the Texas case.

The Court: You can't void a stipulation because now you place a different interpretation on it.

Mr. Sifton: I beg your pardon, your Honor?

The Court: That's what you're doing.

Mr. Sifton: I am not. I'll read very simply exactly what it says. It says, your Honor, it says, "Specifically depositions of Dow in the spring."

The Court: Right.

Mr. Sifton: That was the contingency we were covering. Depositions of Dow in the spring up here in New York. We didn't get to Dow in the spring in New York. We're now—

The Court: That's true, but whose fault was it that you didn't get to Dow or Dow didn't get to you or whomever it may be?

Mr. Sifton: Certainly not ours, your Honor. The entire time it was our witnesses who were being deposed by others.

The Court: I'm certainly not going to blame any one defendant. All defendants are all seeking certain—

Mr. Sifton: It's not a matter of blame, your Honor. It's simply a matter of—

The Court: But the contingencies—to cover all contingencies, cannot be limited to your situation at all alone. It's all the contingencies in the case and you left it out of the original stipulation submitted for the Court's signature.

Mr. Sifton: Cover the contingencies in the depositions in the spring. There have been no depositions in the spring and I've read it, your Honor, of course—

The Court: Sure, you recognize that.

Mr. Sifton: I do not recognize it, your Honor, I beg to differ.

The Court: You recognize it in the minutes.

Mr. Sifton: Yes, your Honor.

The Court: Placed in the minutes for a reason. To cover all contingencies as explicit and means exactly what it says, to cover any and all contingencies.

Mr. Sifton: Your Honor, depositions in the spring also means what it says. I can't understand, your Honor, why there is any desire to get the property damage discovery entwined with the personal injuries litigation.

The Court: It isn't a question of getting it entwined. It's simply the property damage situation, no problem at all.

Mr. Sifton: That is precisely what Mr. Rivkin is proposing. To bring the propery damage, $135 million situation into personal injury action seems to me not in the interest of the plaintiff.

The Court: What he is saying, once you've completed the personal injury action deposition you can go into the same witnesses you desire. Bring your lawyers up. Question them, examine them.

Mr. Sifton: In the context—before the Master up here? It's just not in anybody's interest. It seems to me, it's not in—

The Court: It may not be in your interest but it's in somebody's interest. I can't say anybody.

Mr. Sifton: Doesn't seem to be in the plaintiff's interest up here.

The Court: Plaintiff's not even here to discuss or—

Mr. Sifton: They didn't get notice of it because Mr. Rivkin didn't send them notice. I don't think they would take part in any event if they were—

The Court: Personally, I believe they may take part. Their actions might be delayed by what you're doing in Texas.

Mr. Sifton: Your Honor, they're not parties of the action in Texas.

The Court: They're parties to actions here.

Mr. Sifton: Why can't we get started in Texas with a simple deposition in which Dow can be represented by Texas counsel?

The Court: You say this is a simple deposition you have here.

Mr. Sifton: Yes, your Honor.

The Court: You want the whole working organization?

Mr. Sifton: That's how it has to start. That's something that any—any Dow attorney can represent—

The Court: Indeed, someone who knows something about what you're asking. You want to know about the employees assigned to each such department, branch and other groupings, and that's all over.

Mr. Rivkin: All documents, your Honor.

Mr. Sifton: They have the firm of Bracewell and Paterson, which is not here, which is counsel for Dow in Texas, who can represent them in connection with that.

The Court: I don't think it's a question of representation. Producing the people that you seek to depose, that's the problem.

Mr. Sifton: Is Dow only to litigate one lawsuit at a time?

The Court: No, of course not. Litigate as many as they can be fit. If those lawsuits do not affect—a lawsuit that has priority and that lawsuit has priority.

Mr. Sifton: Your Honor, they have gone down into the Texas court—

The Court: I may very well use 2283, if I have to. That lawsuit has priority, forty people that were—this lawsuit is going to take priority over that lawsuit and is going to be completed and going to be tried this year. That's the position the Court is going to take. It's not going to stand for any other petitions or proceedings in any other court or any other state. That's the Court's ruling on it.

All right, pursuant to the stipulation on record.

Mr. Sifton: Can I understand your Honor's ruling, please?

The Court: My ruling is—the motion is granted and it's stayed. It's stayed from proceeding.

Mr. Rivkin: The entire action?

The Court: Yes. Pursuant to stipulation that's been placed on the record.

Mr. Rivkin: Excuse me, just for a second. If I understand it correctly, pursuant to the stipulation, discovery in Texas is stayed.

The Court: Yes. Until discovery in New York is completed. That's the Court's interpretation of that stipulation.

Mr. Rivkin: Thank you, sir. There is nothing to do with 2283.

The Court: Right.

Mr. Rivkin: Thank you, sir.

The Court: All right.

Mr. Rivkin: May I ask the Court for the papers I handed it?

The Court: Yes.

(Time noted: 12:20 p.m.)

Notice of Motion Dated July 24, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

PLEASE TAKE NOTICE that upon the annexed affidavit of Charles P. Sifton, sworn to July 24, 1975, the undersigned will move this Court, at Courtroom 1, the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, New York, New York, before the Honorable Mark A. Costantino, United States District Judge, on the 30th day of July, 1975 at 10:00 a.m. in the forenoon, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 62(c) of the Federal Rules of Civil Procedure suspending the injunction of this Court announced in open court on July 23, 1975 enjoining Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. from proceeding in the District Court of Harris County, Texas, 157th Judicial District, with the prosecution of the action entitled "Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. v. The Dow Chemical Company and Battelle Memorial Institute, Index No. 1,013,628," during the pendency of the appeal from such injunction and for such other relief as may be just.

Notice of Motion Dated July 24, 1975

Dated: New York, New York
July 24, 1975

Yours, etc.

LeBoeuf, Lamb, Leiby & MacRae

By /s/ Charles P. Sifton
Attorneys for Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc.
Office and P. O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

To: All Parties

Affidavit of Charles P. Sifton in Support of Motion for a Stay Pending Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CHARLES P. SIFTON, being duly sworn, deposes and says:

1. I am a member of the law firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys of record for Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. ("Texas Eastern") in a proceeding commenced by those two parties against The Dow Chemical Company ("Dow") in the District Court of Harris County for the 157 Judicial District of Texas.

2. I make this affidavit in support of the motion of Texas Eastern, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, for an order suspending the injunction announced by this Court on July 23, 1975 enjoining Texas Eastern from proceeding to take depositions on oral examination of the defendant Dow in the Texas action until such time as depositions on oral examination shall be taken by the parties in this action, pending appeal from that action which will be noticed as soon as an order is entered.

3. The basis for Texas Eastern's application is in brief summary that this Court's injunction is prohibited by the

terms of Title 28, United States Code, Section 2283, and is, moreover, flatly in conflict with the decision of the State Court in Texas denying Dow's application to abate proceedings in the Texas action because of the pending proceeding here in New York. Neither the letter nor the spirit of the stipulation entered into between the parties in this action on March 12, 1975 is in any way violated by Texas Eastern's efforts to conduct depositions on oral examination in Texas. Finally, the discovery sought in the Texas action will in no way conflict or impede the conduct of proceedings in this Court. On the contrary, the effort to delay discovery in the Texas action until discovery has been completed will inevitably create conflict in the scheduling of the trial of this action.

4. Shortly following the decision of this Court of March 21, 1975 to hold in abeyance Dow's motion, pursuant to Title 28, U.S.C. §2283, Dow brought on for trial before the Honorable Arthur F. Lesher Jr., Presiding Judge in the Texas proceeding, its application to abate proceedings in the Texas action because of the pending proceeding here in New York. On May 19, 1975, a hearing was held on Dow's application at which evidence was introduced by Dow, both with respect to the pendency of the two actions and the alleged harassment and inconvenience to Dow resulting therefrom. Dow presented both evidence and argument concerning the conflicts in discovery which it now argues before this Court. Following argument by the parties and the exchange of post-hearing briefs on the same legal issues which have been briefed by Dow in this proceeding, Judge Lesher denied Dow's request to abate the Texas pro-

ceeding. Having litigated these issues in the Texas forum and lost, Dow is in no position to relitigate them before this Court.

5. Dow's effort to expand the stipulation entered into on March 12, 1975 between the parties in an attempt to block discovery in the Texas action until discovery has been had in this action has no basis, either in the letter or in the spirit of that stipulation. Texas Eastern and Dow agreed to no more than that when and if Dow witnesses were deposed in New York this spring, Texas Eastern would depose them in connection with the property damage action, but that if the Dow witnesses were deposed in the spring and the trial remained scheduled for June, then Texas Eastern would not depose them in New York in connection with the property damage action. No Dow witnesses were deposed this spring, and nothing in the language of the stipulation or in its spirit covered the situation which has arisen.

6. The claim that Dow will be unable to conduct depositions in the Texas action if it has depositions in the personal injury actions has no basis in fact. Dow is represented by different attorneys in the New York and Texas actions. As an examination of plaintiffs' Notice to Take Oral Deposition in the Texas action shows, Texas Eastern is presently proposing in Texas the most preliminary and basic discovery which any attorney for Dow should be in a position to handle.

7. With due respect, the Court's decision to grant Dow's application to enjoin discovery in the State Court proceed-

ing is in direct violation of the prohibitions of Title 28, U.S.C. §2283. Nothing has been called to this Court's attention which brings the circumstances of this case within the express exceptions to the prohibitions contained in that statute. Nothing in Section 2283 gives this Court authority to expand the scope of the parties' stipulation to force Texas Eastern and the Texas court to await proceedings in New York.

WHEREFORE, for the reasons set forth herein and in the prior affidavits presented to this Court in opposition to Dow's application to enjoin proceedings in Texas, it is respectfully requested that this Court suspend, pending appeal, its injunction against the conduct of depositions of The Dow Chemical Company by Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc.

/s/ CHARLES P. SIFTON

[Jurat omitted in printing.]

[The Plaintiffs' Notice to Take Oral Depositions in the District Court of Harris County, Texas originally appended to the Affidavit of Charles P. Sifton in Support of Motion for a Stay Pending Appeal is reprinted at page 113a of this Appendix.]

Memorandum and Order of Hon. Mark A. Costantino Dated August 1, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Appearances:

LeBoeuf, Lamb, Leiby & McRae, Attorneys for Texas Eastern Transmission Corp., 140 Broadway, New York, New York 10005, by Charles P. Sifton, Esq.

Rivkin, Leff & Sherman, Attorneys for Dow Chemical Company, 55 North Ocean Avenue, P.O. Box 669, Freeport, New York 11520, by Leonard L. Rivkin

COSTANTINO, *D.J.*

This is an application to have the terms of a stipulation entered into between the attorneys for Texas Eastern Transmission Corp. and Texas Eastern Cryogenics, Inc. (TETCO) and the Dow Chemical Company (DOW) interpreted and enforced. These parties are codefendants in the complex litigation which arose out of the catastrophe at the liquid natural gas tank on Staten Island, New York on February 10, 1973 in which forty men were killed. Approximately fifty-five separate actions have been filed and TETCO and DOW are codefendants in almost every suit.

Memorandum and Order of Hon. Mark A. Costantino
Dated August 1, 1975

The suits are brought on behalf of the estates of the deceased workers and essentially are based upon wrongful death.

Because of the complex sequence of events it is useful to state the history of this particular controversy. In February 1975 TETCO served upon DOW a complaint commencing an action in Harris County District Court, Texas for property damage arising out of the Staten Island incident. On March 6, 1975 argument was held on DOW's motion to enjoin TETCO from proceeding in the Texas state court action, pursuant to 28 U.S.C. §2283. Decision was reserved and the parties were permitted to submit further memoranda of law. On March 12, 1975 argument was held on another DOW motion—this one to stay TETCO from proceeding with discovery in the Texas state action. Apparently TETCO had proceeded with its action in Texas and was seeking discovery while this court was considering the section 2283 motion previously argued. The conclusion of the argument on March 12 was the following stipulation which was agreed upon by Taylor R. Briggs, Esq., of LeBoeuf, Lamb, Leiby & MacCrae, attorneys for TETCO and Leonard L. Rivkin, Esq., of Rivkin, Leff and Sherman, attorneys for Dow:

> It is hereby stipulated and agreed by and between the attorneys for Dow and Texas Eastern the following—
>
> If at the end of the depositions of Dow witnesses this spring, it appears that this trial will go forward in June as scheduled, discovery in the Texas action will await the end of this trial.

Memorandum and Order of Hon. Mark A. Costantino
Dated August 1, 1975

> If for any reason at the end of the depositions of Dow witnesses this spring, it should appear that trial will not go forward in June Dow will make its witnesses available in New York for depositions in the Texas case immediately following examinations of those witnesses by the parties in this case.

At that argument Mr. Rivkin stated that the stipulation applied only to DOW's motion to stay TETCO from proceeding with discovery in the state action in Texas and that with that understanding Dow was withdrawing its motion to stay the discovery. Mr. Rivkin stated that he was waiving no rights with regard to the section 2283 motion and wished the court to continue to consider that motion. The stipulation related above was "so ordered" by this court on March 14, 1975.

On March 21, 1975 this court filed a memorandum decision in which it announced its intention to hold "in abeyance" a decision on the section 2283 motion because of the stipulation of March 12 until after the trial of the federal action "or until such time as any conflict or difficulty with regard to simultaneous proceedings in both actions are brought to the court's attention."

Mr. Briggs for TETCO then wrote to the court that his interpretation of the stipulation was that TETCO agreed to await the end of the federal trial to start discovery in the Texas state action, but that if "the trial does not commence as scheduled, then discovery in the State action will go forward." (Letter of Taylor R. Briggs, March 31, 1975, p. 2).

Memorandum and Order of Hon. Mark A. Costantino
Dated August 1, 1975

Because of the growing complexity of the discovery proceedings in these suits this court found it necessary on May 27, 1975 to appoint a Special Master to continue supervising the depositions. The formal Order of Appointment was filed June 11, 1975. The originally scheduled trial date of June 2 was adjourned (tentatively until October 6, 1975) and depositions were continued under the guidance of the Special Master.

By letter dated July 16, 1975 Mr. Rivkin notified the court that DOW had received "Plaintiffs' Notice To Take Oral Depositions" in the Texas state action against DOW. He stated that he believed this notice was contrary to the stipulation of March 12 and order of March 14. A conference between counsel for DOW and TETCO was then arranged for July 23, 1975 at 10:00 a.m. in my courtroom. By letter dated July 2[illegible], 1975 Charles P. Sifton of LeBoeuf, Lamb, Leiby & MacRae, counsel to TETCO responded to Mr. Rivkin's letter restating TETCO's interpretation of the earlier stipulation. Mr. Sifton further informed the court that DOW had brought a motion to "abate" proceedings in the Texas state action because of the litigation in this court. That motion was denied.

The question before this court is very simply whether TETCO is bound by the March 12 stipulation to refrain from proceeding with discovery in the Texas state action *in Texas* even though trial in the federal action did not begin June 2, and whether TETCO is required to depose DOW witnesses *in New York* after the other parties in the federal action have had an opportunity to do so. Thus stated the problem becomes determining the intentions of

Memorandum and Order of Hon. Mark A. Costantino
Dated August 1, 1975

the parties at the time the stipulation was made. This court sees no other interpretation possible but that the parties agreed that if the June trial date was not adhered to, TETCO would come to New York (where, of course, they already were) and depose the DOW witnesses after the federal parties had their opportunity to do so. The intention stated at the March 12, 1975 argument was that the parties were to attempt to interfere with the federal action as little as possible. Particularly now, when the depositions of DOW witnesses may take place within the next few weeks, to burden counsel and DOW witnesses with discovery proceedings in two cases arising out of the very same incident would be unreasonable and contrary to the intention of the parties and the understanding of the court at the time of the argument preceding the stipulation.

Accordingly, this court holds that TETCO must abide by its stipulation of March 12, 1975 and refrain from noticing discovery procedures in the state action in Texas until the completion of the depositions of the DOW witnesses in New York in the Federal action at which time it may proceed to depose witnesses and otherwise discover information from DOW in New York until such time as either party makes application to this court based upon reasons not inconsistent with this opinion.

So Ordered.

/s/ Mark Costantino
U. S. D. J.

Notice of Appeal Dated August 4, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MADELINE ERIA, individually and as Administratrix of the goods, chattels and credits which were of VINCENT M. ERIA, deceased,

Plaintiff,

—against—

TEXAS EASTERN TRANSMISSION CORP., TEXAS EASTERN CRYOGENICS, INC., BROWN & ROOT, INC., NAPP GRECCO COMPANY, BATTELLE MEMORIAL INSTITUTE, THE DOW CHEMICAL COMPANY, G. T. SCHJELDAHL INC., and E. I. DUPONT DE NEMOURS & Co.,

Defendants.

NOTICE IS HEREBY GIVEN that Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc., defendants in the above-named proceeding, hereby appeal to the United States Court of Appeals for the Second Circuit from the decision of July 23, 1975 and the Memorandum and Order of the Honorable Mark A. Costantino entered on August 1, 1975 enjoining said defendants from proceeding with discovery in the District Court of Harris County, Texas, 157th Judicial District, in the action entitled "Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. v. The Dow Chemical Company and Battelle Memorial Institute, Index No. 1,013,628."

Notice of Appeal

Dated: New York, New York
August 1, 1975

Yours,

LeBoeuf, Lamb, Leiby & MacRae

By /s/ Charles P. Sifton
Charles P. Sifton
Attorneys for Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc.
Office and P. O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

To: All Parties